Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

LAURA SCHUBERT,
Petitioner,
v.
PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Free Exercise Clause of the First Amendment preclude the imposition of civil liability for the religiously-motivated assault and false imprisonment of a non-consenting minor?

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OPINION BELOW

The Opinion of the Texas Supreme Court appears at 1a.[1]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Texas Supreme Court issued its Opinion and entered Judgment on June 27, 2008. Petitioner's timely petition for rehearing was denied on August 29, 2008. 70a.

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[1] References to the Appendix to this Petition are in the form "1a."

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." UNITED STATES CONSTITUTION, Amendment I.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." UNITED STATES CONSTITUTION, Amendment XIV.

INTRODUCTION

Without her consent, and against her will, Petitioner Laura Schubert was physically restrained and subjected to a "laying on of hands" by Respondents on two occasions during 1996. As a result of these non-consensual physical invasions, Ms. Schubert, then a minor under Texas law,[2] suffered bruises and other immediate physical injuries, as well as post-traumatic stress disorder.[3]

In 1998, Ms. Schubert filed suit against Respondents in Texas state court, asserting causes of action under state law. After lengthy pretrial proceedings, Ms. Schubert's claims for assault and

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[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (Vernon 2007) ("The age of majority in this state is 18 years."). At the time of the incidents in question, Ms. Schubert was 17 years old.

[3] Ms. Schubert was subsequently classified as disabled by the Social Security Administration. 7a.

false imprisonment were tried to a jury, which ruled unanimously in her favor.[4] The trial court rendered judgment for Ms. Schubert on the jury's verdict of false imprisonment.

The Court of Appeals of Texas affirmed the trial court's judgment, except that it reduced the damages by eliminating the award for loss of earning capacity on the ground those damages were unforeseeable.

A divided Texas Supreme Court reversed, and dismissed Ms. Schubert's claims in their entirety, based solely on the Majority's interpretation of the Free Exercise Clause of the First Amendment to the United States Constitution.[5]

Because the Texas Supreme Court's ruling dramatically and dangerously departs from this Court's First Amendment jurisprudence, Ms. Schubert respectfully requests that this Petition be granted.

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[4] Other claims asserted by Ms. Schubert and her parents were dismissed at various points during the case, before submission to the jury.

[5] Because the Texas Supreme Court dismissed based only on its interpretation of the First Amendment, it did not reach any of the other issues presented by the parties. Petitioner is not seeking review in this Court of those issues not yet decided by the Texas Supreme Court, which were fully briefed and argued before that Court, and could be addressed in the event the decision below is reversed, and the case remanded.

STATEMENT OF THE CASE

A. Trial Court Proceedings

After a three week trial, featuring the testimony of more than thirty witnesses through live appearances or depositions transcripts, twelve jurors unanimously concluded that six individual defendants had falsely imprisoned and assaulted Ms. Schubert.[6] The jury awarded Ms. Schubert $150,000 for "[p]hysical pain and mental anguish sustained in the past," $10,000 for "loss of earning capacity sustained in the past," $12,000 for past medical care, and $16,000 for medical care that she was reasonably likely to sustain in the future. The jury also awarded $112,000 for "[l]oss of earning capacity that, in reasonable probability" she would sustain in the future.[7]

The trial court rendered judgment on the jury's verdict of false imprisonment, awarding the damages found by the jury, and added Pleasant Glade as a judgment debtor with joint and several liability for

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[6] The jury also concluded three other individuals had not assaulted or falsely imprisoned Ms. Schubert. The Court's Charge to the Jury, Jury Questions, and the jury's responses appear at 58a-69a.

[7] As instructed, the jury allocated responsibility for the damages among the defendants it found had assaulted and falsely imprisoned Ms. Schubert, with Pleasant Glade's senior pastor and youth minister responsible for 50% and 25% respectively. 64a.

the damages apportioned to its senior pastor and youth minister. 9a.

B. Texas Court of Appeals's Decision

Respondents appealed to the Texas Court of Appeals, where they argued:

> [A] clear and convincing proof of malice requirement similar to that which the United States Supreme Court has applied to libel actions under the Free Speech Clause should be applied to [Ms. Schubert's] claims and that the judgment against them should be reversed because the evidence conclusively establishes that they did not act with malice.[8]

They also argued, in the alternative, that:

> [T]he case should be remanded for a new trial because the trial court erred in refusing to submit jury instructions on the issue of malice and the clear and convincing evidentiary standard.[9]

In evaluating these arguments the Texas Court of Appeals considered the relevance of pretrial proceedings during which Respondents had sought a Writ of Mandamus ordering the trial court to dismiss

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[8] 174 S.W.3d 388, 405-06 (Tex. App. 2005).

[9] *Id.* at 406.

those of Ms. Schubert's claims which were "religious" in nature.[10]

During that proceeding Respondents had asked that the Court of Appeals "allow [Ms. Schubert's] claims for assault and battery and false imprisonment 'to go forward' because . . . these claims constitute 'a "secular controversy" and do not come within the protection of the First Amendment.'"[11]

As requested by the Respondents, the Texas Court of Appeals granted the relief sought, dismissing all "religious" claims, and allowing Ms. Schubert's assault, battery and false imprisonment claims to proceed to trial "with all of the [Defendants'] acquiescence."[12] Therefore, on appeal from the jury verdict and judgment, the Court of Appeals determined that "[h]aving obtained, in the prior mandamus proceeding, the dismissal of all but [Ms. Schubert's] assault and false imprisonment claims, which they swore under oath should 'go forward' because they were purely secular and

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[10] *Id.*

[11] *Id.*

[12] *Id.* The decision of the Texas Court of Appeals regarding the Writ of Mandamus was published as *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App. 1998). In that decision, conditionally granting the writ, the Court of Appeals noted that Defendants did "not argue that the false imprisonment, assault and battery claims should be protected from objectionable discovery or dismissed based on the [First Amendment] defense." *Id.* at 88.

entitled to no First Amendment protections," Respondents could not then "'play fast and loose' with the judicial system by taking the opposite position" on appeal of the jury's verdict.[13] The Court of Appeals therefore held that Respondents were estopped from advancing their argument that the jury should have applied a "clear and convincing proof of malice requirement" at trial.[14]

C. Texas Supreme Court's Decision

As they had in the Texas Court of Appeals, Respondents argued before the Texas Supreme Court that the jury should have been instructed that it could impose liability only upon a finding of malice or foreseeability.[15] They further argued that the

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[13] 174 S.W.3d at 407.

[14] *Id.* at 405-07. The Texas Court of Appeals addressed a number of other issues not relevant to this Petition. Among those, the Court of Appeals reversed the award of damages for loss of earning capacity on the ground such damages were unforeseeable. *Id.* at 398-99.

[15] In its Petition for Review before the Texas Supreme Court, Pleasant Glade argued that court "should limit this intrusion of tort liability into First Amendment freedom by requiring malice and forseeability." Pleasant Glade Petition for Review at ix. It formulated the issue for review as: "Whether the Court of Appeals erred in finding that the First Amendment right to freedom of exercise of religion did not place any constraints on civil liability (i.e. requirement of malice or forseeability) . . . ." 73a. In its merits brief before the Texas Supreme Court, Pleasant Glade argued: "Tort liability certainly does not disappear. But it must be limited. Specifically, tort liability must be *narrowly tailored* (actually, only slightly tailored), so

Texas Court of Appeals had erred in concluding that Respondents were estopped from raising this argument by virtue of the positions they had taken during the earlier mandamus proceeding before the Texas Court of Appeals.[16]

1. The Majority Decision

The Texas Supreme Court first considered the Texas Court of Appeals's conclusion that Respondents were estopped from raising First Amendment issues on appeal, and determined they were not.[17]

The Texas Supreme Court then turned to the central subject of its Opinion: whether the First Amendment requires overturning the jury's verdict and the trial court's judgment in favor of Ms. Schubert.[18]

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that damages must be *foreseeable*, or that the defendants acted with *malice*." Brief at 7 (emphasis in original).

[16] On appeal the Respondents did not challenge the sufficiency of the evidence to support the jury's conclusion, based on the instructions it received, that they had falsely imprisoned and assaulted Ms. Schubert.

[17] Chief Justice Jefferson and Justice Green contended that the Majority erred in its analysis of the issue, but they also concluded that Respondents were not estopped. 30a-31a, 47a n.12. Justice Johnson's opinion does not address the issue.

[18] The First Amendment applies to Texas and other states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

Over the vigorous dissents of three of their colleagues, six members of the Texas Supreme Court concluded that the First Amendment required dismissal of Ms. Schubert's claims. [19]

The Majority initially acknowledged that Ms. Schubert "suffered carpet burns, a scrape on her back, and bruises on her wrists and shoulders," and that she was "diagnosed as suffering from post-traumatic stress disorder, which the doctors associated with her physical restraint at the church in June 1996." 7a.[20] The Majority, however,

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[19] The Texas Constitution contains a provision regarding freedom of religion. *See* TEX. CONST. art. I, § 6 ("All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion . . . ."). This provision of the Texas Constitution was cited once at the outset of the Opinion, but was not otherwise mentioned or discussed. *See* 2a. In this case, the Texas Supreme Court relied solely on its interpretation of the United States Constitution. In other cases, the Texas Supreme Court has not definitively determined the relationship of Article I, Section 6 of the Texas Constitution to the First Amendment's religion clauses. *See, e.g., HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 649-50 (Tex. 2007) ("We have treated the state and federal Free Exercise guarantees as coextensive absent parties' argument to the contrary, and we do so again here.") (footnote omitted).

[20] All three dissenting Justices specifically observed that Ms. Schubert suffered *both* physical and emotional injuries. *See* 33a (Chief Justice Jefferson, joined by Justice Green and

expressed concern that some of Ms. Schubert's injuries were "emotional or psychological," and that there was some evidence those injuries were due in part to what was *said* to her during the two incidents, as opposed to the physical restraints themselves. 15a-17a.[21] The Majority therefore focused its analysis on these aspects of the case.[22]

Justice Johnson: Ms. Schubert "testified that she suffered *physical* as well as emotional injuries from the assaults.") (emphasis added); 55a (Justice Johnson: "Laura claimed damages for physical injuries and pain as well as mental anguish.").

[21] The expert testimony of Dr. Arthur Swen Helge cited by the Majority to support its assertion that trauma from the physical invasion could not be separated from trauma from other aspects of the incidents was elicited *outside the presence of the jury*, during argument on a motion to exclude. Following lawyer questioning of Dr. Helge and arguments by counsel without the jury, the trial judge permitted Dr. Helge to testify, but admonished him to "stay away from the religious aspects" (March 7, 2002, Tr. at 88) – which he did. The only testimony he gave before the jury about his view of the cause of Ms. Schubert's post-traumatic stress disorder was: "It's my opinion that she saw the events that occurred around that time as being a threat to her personally, physically, emotionally. She was unable to cope with that. And over a rapid period of time, she began to develop the major symptoms of post-traumatic stress disorder, which persisted chronically after that. It [a]ffected her life and her personal life, social life, family life, and career." (March 7, 2002, Tr. at 161). Of course, the fact that one witness stated it would be "hard" for him to distinguish between sources of Ms. Schubert's injuries does not mean that other witnesses could not do so. *See* 47a (Chief Justice Jefferson, noting another expert said "she *could*

First, while recognizing that Ms. Schubert's "secular injury claims" – that is, her claims based on the physical restraint by the Defendants – "might theoretically be tried without mentioning religion," the Majority worried that "the imposition of tort liability for engaging in religious *activity* to which the church members adhere would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles of its religious *beliefs*." 20a (emphasis added).[23]

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separate the two") (emphasis in original). If the Texas Supreme Court believed it was an error to permit Dr. Helge to testify, the First Amendment did not require converting that error into an order for dismissal of Ms. Schubert's claims in their entirety.

[22] The Majority accordingly downplayed the non-consensual physical invasion itself, as well as the immediate tangible injuries that resulted. *See, e.g.*, 15a-16a ("Although she suffered scrapes and bruises during these events, her proof at trial related solely to her subsequent emotional or psychological injuries."); *id.* ("Laura did not assert that the church-related events had caused her any physical impairment or disfigurement.").

[23] The Majority offered no support for its contention that the imposition of tort liability for injuries arising from non-consensual physical invasions motivated by religion would chill "religious *beliefs*." Moreover, this Court has repeatedly emphasized that the "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever doctrine one desires." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990); *see also Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with

The Majority then proceeded to examine the role of "laying hands" in Respondents' religious views. Because the court determined that "laying hands" "infuses" their belief system,[24] and that "Laura's claims also involve church beliefs on demonic possession and how discussions about demons at the church affected Laura emotionally and psychologically," they concluded that "assessing emotional damages against Pleasant Glade for engaging in these religious practices would unconstitutionally burden the church's right to free exercise and embroil this Court in an assessment of the propriety of those religious beliefs." 23a. Thus, the Majority determined that the First Amendment required dismissal of Ms. Schubert's claims, explaining:

> The Free Exercise Clause prohibits courts from deciding issues of religious doctrine. Here, the psychological effect of church belief in demons and the appropriateness of its belief in 'laying hands' are at issue. Because providing a remedy for the very real, but

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mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?").

[24] As Chief Justice Jefferson recognized, the Majority made this determination based on information not presented to the jury. *See* 38a-39a.

> religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute. Accordingly, we reverse the court of appeals' judgment and dismiss the case.[25]

2. The Three Dissenting Opinions

Chief Justice Jefferson and two other Justices dissented, strongly disputing the Majority's view, and specifically its interpretation of the First Amendment and this Court's precedents.

Writing for himself as well as Justice Green and Justice Johnson, Chief Justice Jefferson explained:

> Here, assuming all facts favorable to the [jury's] verdict, members of Pleasant Glade restrained Schubert on two separate occasions against her will. During the first encounter, seven members pinned her to the floor for *two hours* while she cried, screamed, kicked flailed, and demanded to be released. This violent act caused Schubert multiple bruises, carpet burns, scrapes and injuries to her wrists, shoulders and back.[26]

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[25] 26a-27a.

[26] 31a (emphasis in original).

As it was tried to the jury, the case:

> is not about beliefs or 'intangible harms' – it is about violent action – specifically, twice pinning a screaming, crying teenage girl to the floor for extended periods of time. That was how it was presented to the jury, which *heard almost nothing about religion during the trial* due to the trial court's diligent attempt to circumvent First Amendment problems and to honor the court of appeals' mandamus ruling that neither side introduce religion as a reason for Laura's restraint . . . . [T]he jury was able to award damages without considering – or even being informed of – [Defendants'] beliefs.[27]

Regarding the Majority's view of the First Amendment, Chief Justice Jefferson wrote:

> This sweeping immunity is inconsistent with United States Supreme Court precedent and extends far beyond the protections our Constitution affords religious conduct. The First Amendment guards religious liberty; it does not sanction intentional abuse in religion's name . . . . It is not surprising that the [Majority] cites no

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[27] 38a-39a (emphasis in original).

> case holding that the First Amendment bars claims for emotional damages arising from assault, battery, false imprisonment, or similar torts.[28]

Concerned about the effects of the Majority's decision, he warned: "This overly broad holding not only conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice." 48a-49a.

As for the Majority's claim that the case must be dismissed because it "presents an ecclesiastical dispute over religious conduct" (2a), Chief Justice Jefferson remarked that "at its core the case is about secular, intentional tort claims . . . . [W]e simply need not evaluate the validity of [Defendants'] religious beliefs, or even inquire into the assailants' motives, to hold [Defendants] liable for its intentionally tortious conduct." 32a-33a, 41a.

Moreover, citing this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Chief Justice Jefferson explained that "any religious motivation [Defendants] may have had is irrelevant to our consideration. The tort of false imprisonment is a religiously neutral law of general applicability, and the First Amendment provides no protection against it." 40a.

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[28] 28a, 36a.

In addition to joining Chief Justice Jefferson's entire dissenting opinion, Justice Green authored a short additional opinion of his own. In it, he focused on the Majority's failure to follow this Court's decision in *Smith*, 494 U.S. 872, observing:

> [T]oday's decision ignores the rule that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," *Smith*, 494 U.S. at 887, replacing it with a far more dangerous practice: a judicial attempt to "balance against the importance of general laws the significance of religious practice," *id.* at 889 n.5. "The First Amendment's protection of religious liberty does not require this." *Id.* at 889. The trial court heeded these admonishments, but the [Majority] today does not.[29]

Justice Green also took issue with the Majority's defense of its decision to dismiss on the grounds that "religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church." 24a.[30] In response, he

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[29] 50a-51a.

[30] The Majority similarly observed that "the 'laying of hands' and the presence of demons are part of the church's belief system and accepted as such by its adherents. These practices are not normally dangerous or unusual and apparently arise in

explained: "If Schubert had consented to the church's actions, the consent . . . would have completely defeated her claims. The jury, however, found that Schubert had not consented, and [Defendants] do[ ] not challenge that conclusion." 50a n.1 (citations omitted).[31] He further observed, the Majority "treats church membership as an across the board buffer to tort liability . . . . We are in no position to decide that the ordeal to which Schubert was subjected was so 'expected' and 'accepted by those in the church' as to overcome Schubert's vehement denial of consent at the time of the incidents. Further, the scant evidence does not support the [Majority's] conclusion." 44a.

While joining most of Chief Justice Jefferson's opinion, Justice Johnson also wrote separately to emphasize the "direct evidence of physical injury and

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the church with some regularity. They are thus to be expected and are accepted by those in the church. That a particular member may find the practice emotionally disturbing and non-consensual when applied to her does not transform the dispute into a secular matter." 26a.

[31] Chief Justice Jefferson also pointed out that "lack of consent is an element of false imprisonment on which we have an affirmative jury finding in this case . . . and [Defendants] did not challenge that finding at the court of appeals and do[ ] not raise it here." 44a. The jury was instructed: "'Falsely imprison' means to willfully detain another without legal justification, against her consent, whether such detention be effect by violence, by threat, or by any other means that restrains a person from moving from one place to another." 62a.

pain from the restraints" on Ms. Schubert, which "were within the knowledge of the jurors." 55a. Taking issue with the Majority's invocation of the First Amendment as the basis for wholesale dismissal of the case, he concluded "there is legally sufficient evidence to support damages for physical injury and pain even if all evidence of Laura's subsequent and ongoing intangible psychological injuries were to be disregarded. Thus, the judgment for damages from physical pain and mental anguish should be upheld." 55a-56a.[32]

D. Further Proceedings Before the Texas Supreme Court

Ms. Schubert filed a motion for rehearing on July 11, 2008. The Texas Supreme Court denied that motion on August 29, 2008. 70a.

Following the denial of her rehearing motion, counsel for Ms. Schubert advised the Texas Supreme Court of her intention to file a petition for a writ of certiorari with this Court, and therefore moved to stay issuance of the mandate.[33] The Texas Supreme

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[32] Chief Justice Jefferson noted, without any disagreement by the Majority, that Defendants "did not request that the damages be segregated, and so waived any complaint that her physical injuries were not compensable." 33a. The jury also awarded damages for "lost earning capacity sustained in the past," and for past "medical care," (65a-66a) – clearly concluding that Ms. Schubert suffered *tangible* harm.

[33] Ms. Schubert's motion to stay issuance of the mandate advised the Texas Supreme Court that she intended "to

Court denied Ms. Schubert's motion to stay issuance of the mandate on September 12, 2008.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because the Texas Supreme Court's decision and interpretation of the First Amendment conflicts with relevant decisions of this Court, as well as with decisions of other state courts of last resort and federal courts of appeals. *See* SUP. CT. R. 10(b), (c).

I. THE TEXAS SUPREME COURT'S DECISION MISINTERPRETS THE FIRST AMENDMENT AND FAILS TO FOLLOW AND PROPERLY APPLY THIS COURT'S PRECEDENTS

The Texas Supreme Court's decision in this case is fundamentally at odds with this Court's precedents and the First Amendment itself.

This Court has reviewed numerous state court interpretations of the Free Exercise Clause – often reversing decisions predicated on misinterpretations of the First Amendment. *See, e.g., Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (reversing judgment of Oregon

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petition the Supreme Court of the United States for a writ of certiorari on the grounds that this case presents an important question regarding interpretation of the United States Constitution, and that the decision of this Court is inconsistent with decisions issued by the Supreme Court of the United States and other courts."

Supreme Court); *Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990) (affirming decision of Court of Appeal of California); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707 (1981) (reversing decision of Indiana Supreme Court); *McDaniel v. Paty*, 435 U.S. 618 (1978) (reversing decision of Tennessee Supreme Court); *Jones v. Wolf*, 443 U.S. 595 (1979) (vacating judgment entered by Supreme Court of Georgia); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976) (reversing judgment of Illinois Supreme Court); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming decision of Wisconsin Supreme Court); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969) (reversing judgment of Supreme Court of Georgia); *Sherbert v. Verner*, 374 U.S. 398 (1963) (reversing judgment of South Carolina Supreme Court); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing judgment of Supreme Court of Errors of Connecticut); *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming Supreme Court of the Territory of Utah).

The Court should grant this Petition because the Texas Supreme Court's decision and interpretation of the First Amendment conflicts with relevant decisions of this Court. *See* SUP. CT. R. 10(c).[34]

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[34] Because the Texas Supreme Court dismissed solely on the basis of its interpretation of the Free Exercise Clause, this Petition focuses on that issue. However, the Texas Supreme

A. The Texas Supreme Court Majority Ignored, and Its Opinion is Inconsistent with, this Court's Decision in *Employment Division v. Smith*

Like many jurisdictions, Texas has long prohibited false imprisonment, through both civil and criminal laws. *See, e.g., Arms v. Campbell*, 603 S.W.2d 249 (Tex. App. 1980); *Big Town Nursing Home, Inc. v. Newman*, 461 S.W.2d 195 (Tex. App. 1970); *Hooper v. Deisher*, 113 S.W.2d 966, 967 (Tex. App. 1938) (false imprisonment "is the willful detention of another against his consent and where it is not expressly authorized by law"); *Landrum v. Wells*, 26 S.W. 1001 (Tex. App. 1894); TEX. PENAL CODE art. 513 (1879); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 127 (1768) (discussing "the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous crime, but has also given a private reparation to the party . . . by

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Court's dismissal of Ms. Schubert's claims to accommodate religiously-motivated conduct not immunized by the Free Exercise Clause is itself a violation of the Establishment Clause, applied through the Fourteenth Amendment. While there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," the Texas Supreme Court's attempt at accommodation falls outside any permissible boundaries. *Cutter v. Wilkinson*, 544 U.S. 709, 719-24 (2005); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 n.1 (1984) ("The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment.").

subjecting the wrongdoer to a civil action . . . ."); *see generally* MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND THE ABUSE OF LEGAL PROCESS (1892).

Texas also joins other jurisdictions in prohibiting assault through its civil and criminal laws. *See* TEX. PENAL CODE ANN. § 22.01 (Vernon 2007) (defining offense of assault); *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 649-50 (Tex. App. 2005) ("The elements of assault are the same in both the criminal and civil context."); *Gulf, C. & S.F. Ry. Co. v. Perry*, 30 S.W. 709, 709 (Tex. App. 1895) (sustaining civil verdict); *Galveston, H. & S.A. Ry. Co. v. McMonigal*, 25 S.W. 341, 342 (Tex. App. 1893) ("[A] cause of action existed for the assault, and the damages proper to be considered were those sustained by him physically and mentally and of pecuniary nature, which were the proximate results of the act."); TEX. PENAL CODE art. 484 (1879) ("Any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it, an immediate intention, coupled with an ability to commit a battery, is an assault.").

A properly instructed jury determined that Ms. Schubert was assaulted and falsely imprisoned by Respondents.[35] The Texas Supreme Court

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[35] The jury was instructed: "A person commits an assault if he (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly

overturned that verdict and the trial court's judgment, and dismissed Ms. Schubert's claims altogether, having concluded that the Free Exercise Clause immunized Respondents from liability under neutral and generally applicable laws prohibiting assault and false imprisonment.

Remarkably, the Texas Supreme Court did so without even acknowledging this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) – let alone trying to reconcile its holding with this Court's precedent.

Smith is just one of a long line of cases which make clear that an individual's religious beliefs do not "excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79.

The Texas Supreme Court's decision does not take issue with the fact that Texas law governing assault and false imprisonment is both neutral and generally applicable – applying to anyone, whether their motivation is entirely secular or religious, and

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causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative." 63a. It was instructed: "'Falsely imprison' means to willfully detain another without legal justification, against her consent, whether such detention be effected by violence, by threat, or by any other means that restrains a person from moving from one place to another." 62a.

if religious, without regard to the particular rationale. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (discussing "neutrality" and "general applicability" under *Smith* standard). Nor does the Majority's opinion dispute that the jury found the elements of these offenses had been established, or that the conduct at issue was actionable under Texas law absent immunity ostensibly conferred on Respondents by the First Amendment.

The Majority nevertheless ignored *Smith* and this Court's other decisions addressing claims to First Amendment-based exemptions from neutral and generally applicable laws.

In fact, the only time a reference to *Smith* even appears in the Majority's opinion is in a citation to Justice Green's dissenting opinion, in which he specifically discussed inconsistency between the Majority's decision and *Smith*.[36]

Petitioner is unaware of any other judicial decision concluding that the First Amendment

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[36] Specifically, Justice Green observed: "today's decision ignores the rule that 'courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,' *Smith*, 494 U.S. at 887, replacing it with a far more dangerous practice: a judicial attempt to 'balance against the importance of general laws the significance of religious practice,' *id.* at 889 n.5. 'The First Amendment's protection of religious liberty does not require this.' *Id.* at 889. The trial court heeded these admonishments, but the [Majority] today does not." 50a-51a.

requires immunity from claims based upon an otherwise actionable non-consensual physical invasion of another person.[37]

B. The Texas Supreme Court Majority's Rationale for Dismissing Ms. Schubert's Claims Conflicts with Other Decisions of this Court Interpreting the Free Exercise Clause

In addition to ignoring *Smith*, the Majority's opinion scarcely addresses this Court's other First Amendment precedents, citing only four decisions of this Court in support of its dismissal of Ms. Schubert's claims. None of these decisions supports the Texas Supreme Court's view of the First Amendment – and several are flatly inconsistent with its view.[38]

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[37] *Smith* and its progeny also make clear "that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws." *Alberto R. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 (2006). Yet this is precisely what the Texas Supreme Court has done here, based on its erroneous reading of the Free Exercise Clause.

[38] It is noteworthy that Respondents' briefs submitted to the Texas Supreme Court did not cite *any* of the First Amendment decisions of this Court relied on in the Majority's Opinion. *See* 75a-78a, 83a-87a, 92a-94a (Tables of Authorities from Respondents' briefs before the Texas Supreme Court). This is not entirely surprising, since the Texas Supreme Court adopted a view of the First Amendment that was not advanced by Respondents.

The Majority first cites *Cantwell v. Connecticut*, 310 U.S. 296 (1940), for the proposition that an "intangible, psychological injury, without more, cannot ordinarily serve as a basis for a tort claim against a church or its members for its religious practices." 17a. *Cantwell*, however, had nothing to do with tort claims – for intangible harms or otherwise. Instead, it addressed the arrest and conviction of three Jehovah's Witnesses for distributing religious literature. Applying the Free Exercise Clause to the states, this Court reversed the convictions. In explaining why those specific convictions should not stand, the Court noted "we find in the instant case no assault or threatening bodily harm." *Id.* at 310. The Court also warned of "coercive activities" by those "in the delusion of racial or religious conceit," noting "[t]hese and other transgressions . . . the States appropriately may punish." *Id.* The Texas Supreme Court misreads *Cantwell* as support for its interpretation of the First Amendment.[39]

The Majority then cites *United States v. Ballard*, 322 U.S. 78 (1944), claiming it as support for its assertion that "because the religious practice of 'laying hands' and church beliefs about demons are so closely intertwined with Laura's tort claim, assessing emotional damages against Pleasant Glade for engaging in these religious practices would unconstitutionally burden the church's right to free

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[39] *See also* 31a, 36a-37a (Chief Justice Jefferson, in dissent, criticizing the Majority's reliance on *Cantwell*).

exercise and embroil this Court in an assessment of the propriety of those religious beliefs." 23a.

Ballard addressed the propriety of charging a jury with finding the truth or falsity of a criminal defendant's religious beliefs. 322 U.S. at 86-88. Like *Cantwell*, it had nothing to do with tort claims of any sort. And *Ballard* similarly lends no support to the Majority's view that the First Amendment forbids the imposition of liability for the assault and false imprisonment of Ms. Schubert.

The Majority next invokes *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), citing it as support for the proposition that the Free Exercise Clause "prohibits courts from deciding issues of religious doctrine." 23a. The Majority also cites and quotes from *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716 (1981), contending:

> 'Courts are not arbiters of religious [sic] interpretation,' and the First Amendment does not cease to apply when parishioners disagree over church doctrine or practices because 'it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker [in

> *Thomas*] more correctly perceived the commands of their common faith.'[40]

Apparently relying on its reading of *Milivojevich* and *Thomas*, the Majority concluded:

> Because determining the circumstances of Laura's emotional injuries would, by its very nature, draw the Court into forbidden religious terrain, we conclude that Laura has failed to state a cognizable, secular claim in this case.
>
> * * *
>
> The Free Exercise Clause prohibits courts from deciding issues of religious doctrine. Here, the psychological effect of church belief in demons and the appropriateness of its belief in "laying hands" are at issue. Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve that dispute. Accordingly, we reverse the court of appeals' judgment and dismiss the case.[41]

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[40] 26a.

[41] 26a-27a (citation omitted).

The Majority misconstrues *Milivojevich* and *Thomas* in concluding they support dismissal of Ms. Schubert's claims.

In *Milivojevich* this Court reviewed a decision of the Illinois Supreme Court which held that church proceedings related to a church's suspension and removal of Bishop were "procedurally and substantively defective under the internal regulations" of the church. 426 U.S. at 697. Observing that First Amendment concerns may be presented by having civil courts "probe deeply enough into the allocation of power within a hierarchical church so as to *decide religious law* governing church polity," the Court concluded that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity . . . in their application to the religious issues of doctrine or polity before them." *Id.* at 709 (internal citations omitted) (emphasis added).

The Texas Supreme Court has misread *Milivojevich* in concluding that the trial of Ms. Schubert's claims required the court or the jury to "decid[e] issues of religious doctrine," or "take sides in what is essentially a religious controversy." 26a. The facts in *Milivojevich* presented a rare instance in which a secular court is forbidden from adjudicating a claim because of requirements imposed by the First Amendment. There, this Court

held the First Amendment permits "hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters," and "requires that civil courts accept their decisions as binding upon them." 426 U.S. at 724-25.

Ms. Schubert's claims bear no resemblance to the claims of the plaintiff in *Milivojevich*, and do not involve any questions about "internal discipline and government." Only by wrenching *Milivojevich* from its facts, and by ignoring the substance of this Court's opinion, could the Texas Supreme Court conclude that the First Amendment required dismissal of Ms. Schubert's claims.[42]

The Texas Supreme Court similarly misconstrues *Thomas* as supporting its conclusion that the First Amendment required dismissal of Ms. Schubert's claims.

Thomas involved the denial of unemployment compensation to a Jehovah's Witness who claimed his religious beliefs prevented him from

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[42] Although "[t]here are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes . . . this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes." *Gen. Council on Fin. and Admin. of the United Methodist Church v. Superior Court of California*, 439 U.S. 1355, 1372 (1978) (Rehnquist, Circuit Justice).

participating in the production of war materials. Reviewing a decision of the Indiana Supreme Court, this Court criticized the State court's reliance on the views of a different Jehovah's Witness who did not believe religious principles prevented him from doing the work Thomas refused on religious grounds, observing that "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed," and that "[c]ourts are not arbiters of scriptural interpretation." 450 U.S. at 715-16. Yet the fact that courts are not arbiters of scriptural interpretation did not prevent this Court from readily determining that Thomas's reasons for quitting his job were, in fact, religious in nature, without running afoul of the Free Exercise Clause.

The Texas Supreme Court Majority quoted from *Thomas*, but failed the heed the teaching of that decision, and the rest of this Court's Free Exercise jurisprudence, which make clear that courts are not stripped of jurisdiction to adjudicate claims merely because religious practices of some or all of the parties form part of the factual backdrop of the case. *See also Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property . . . . [T]here are neutral principles of law, developed for use in all property disputes . . . [and] the [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious

doctrine."); *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) ("[T]he First Amendment prohibits civil courts from resolving church property disputes *on the basis* of religious doctrine and practice ... [but] a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute.") (emphasis added).[43]

The trial of Ms. Schubert's claims in no way required the court or jury to resolve a religious or doctrinal controversy, or to pass judgment on the veracity or efficacy of the religious views of any of the parties. The Majority nevertheless concluded that the religious setting for the underlying facts required dismissal under its reading of the First Amendment. This holding directly conflicts with this Court's precedents. *See, e.g.*, *Jones*, 443 U.S. at 605 ("We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no

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[43] The Majority's First Amendment analysis also failed to accord any significance to the fact that, at the time of the conduct in question, Ms. Schubert was a minor under Texas law. *See supra* note 2. In so doing, it further deviated from this Court's precedents. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (considering "the interests of society to protect the welfare of children" in analyzing free exercise claim); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) ("[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears the parental decisions will jeopardize the health and safety of the child, or have a potential for significant social burdens.").

issue of doctrinal controversy is involved."). Only by dramatically departing from this Court's guidance about what constitutes a non-justiciable "religious dispute" could the Texas Supreme Court conclude that it was required by the First Amendment to dismiss Ms. Schubert's claims in their entirety. [44]

II. THE TEXAS SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS RENDERED BY OTHER STATE COURTS OF LAST RESORT AND BY FEDERAL COURTS OF APPEALS

The Petition should also be granted because the Texas Supreme Court's decision and interpretation of the First Amendment conflicts with decisions of other state courts of last resort and federal courts of appeals. *See* SUP. CT. R. 10(b).

First, although the Majority discusses and seems to rely on *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir.

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[44] Tellingly, the Majority never identified the supposed "religious dispute" which, in its view, required dismissal based on the Free Exercise Clause. The closest the Majority came to identifying any such dispute was to assert "the psychological effect of church belief in demons and the appropriateness of its belief in 'laying-hands' are *at issue*." 26a (emphasis added). Yet, as the dissenting Justices make clear, the trial of Ms. Schubert's claims did not require the court or jury to resolve any genuine religious dispute (*see* 38a-43a), and the Majority's dismissal based on vague assertions to the contrary departs sharply from this Court's case law about non-justiciable religious controversies.

1987), its treatment of that decision instead casts doubt on its interpretation of the First Amendment.

Paul concerned tort claims brought by a disassociated member of Jehovah's Witnesses against the church for requiring its members to "shun" the plaintiff. Although the Ninth Circuit affirmed the dismissal of plaintiff's claims, its analysis lends no support to the Texas Supreme Court's decision in this case.

As an initial matter, the Ninth Circuit properly rejected an expansive reading of *Milivojevich* like the one adopted by the Texas Supreme Court in this case, observing that the "limited abstention doctrine" set out in *Milivojevich* "does not apply." 819 F.2d at 878 n.1.[45]

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[45] Numerous other cases properly adopt a narrower reading of *Milivojevich* than the one employed by the Texas Supreme Court here. *See, e.g.*, *Church of God in Christ, Inc. v. Graham*, 54 F.3d 522, 527 (8th Cir. 1995) ("[B]ecause the rule of deference is premised on the presence of a hierarchical authority, a necessary predicate of the Church's argument fails. Thus, *Milivojevich* is inapposite to this case."); *Pilgrim Rest Missionary Baptist Church v. Wallace*, 835 So.2d 67, 71-74 (Miss. 2003) (analyzing *Milivojevich* and concluding First Amendment did not preclude court from ordering vote of church members to decide whether to terminate pastor); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 773 (Okla. 1989) ("While this dispute involved a religiously-founded disciplinary matter, it was not the sort of private ecclesiastical controversy which the Court has deemed immune from judicial scrutiny [citing *Milivojevich*] . . . . Because the controversy in the instant case is concerned with the allegedly tortious nature of religiously-motivated acts and not with their orthodoxy *vis-à-*

Moreover, in concluding that shunning is not actionable under the tort law of Washington State, the Ninth Circuit specifically considered that "[n]o physical assault or battery occurred," and found the practice did not "constitute a sufficient threat to the peace, safety or morality of the community as to warrant state intervention" in light of First Amendment principles. *Id.* at 883. That analysis stands in stark contrast with the analysis of the Texas Supreme Court Majority, which was confronted with tort claims for precisely the kind of physical invasion the *Paul* emphasizes was not before it. Thus, while the *Paul* court appropriately determined that "[o]ffense to someone's sensibilities resulting from religious conduct is simply not actionable in tort," *id.* at 883, the Texas Supreme Court Majority's treatment of *Paul* highlights the novelty of its reading of the First Amendment rather than supports it.[46]

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vis established church doctrine, the justification for judicial abstention is non-existent and the theory does not apply.").

[46] Unlike the Texas Supreme Court Majority, the Oklahoma Supreme Court appropriately recognized the limits of *Paul*, observing that "[f]or purposes of First Amendment protection, religiously motivated disciplinary measures that merely *exclude* a person from communion are vastly different from those which are designed to *control* and *involve*." *Guinn*, 775 P.2d at 781 (rejecting argument that Free Exercise Clause shielded church and church elders from torts claims for invasion of privacy and intentional infliction of emotional distress brought by former member of congregation) (emphasis in original).

The Texas Supreme Court's decision also conflicts with other courts' views about when the First Amendment strips courts of jurisdiction to resolve cases where the factual background involves a dispute over issues related to religion.[47]

For instance, in *Darab v. United States*, the District of Columbia Court of Appeals rejected defendants' arguments that their convictions for unlawful entry violated the Free Exercise Clause notwithstanding that the convictions arose from a dispute between rival groups for control of a mosque. 623 A.2d 127 (D.C. 1993) (Rogers, C.J.).

Seeking to overturn their convictions by a jury, the *Darab* defendants argued that application of the District of Columbia's unlawful entry statute "was an impermissible government intrusion upon resolution of a religious controversy." *Id.* at 132. Unlike the Texas Supreme Court Majority, the District of Columbia Court of Appeals evaluated defendants' contention by applying *Smith*, and concluded:

> [T]he District's unlawful entry statute is a neutral and generally applicable law. It is not directly aimed at religious practice. As invoked here, the unlawful entry statute was used to quell a disturbance, not a religious service. Thus, it was used to regulate

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[47] Of course, here, there was no genuine religious dispute at issue. *See supra* note 44.

> conduct, not beliefs, a goal vindicated by the Supreme Court in both *Smith II* and *Reynolds*. The Free Exercise Clause cannot be used as a means to escape civic duties.

Id. at 133. And, like the jury that evaluated Ms. Schubert's claims, the *Darab* "jury was not required to resolve any religious issues of contention in order to determine whether [defendants] had violated the unlawful entry statute." *Id.*

The Texas Supreme Court's expansive view of circumstances under which the First Amendment divests a court of jurisdiction also is inconsistent with the decisions of other courts. *See, e.g.*, *McKelvey v. Pierce*, 800 A.2d 840, 857 (N.J. 2002) (reversing dismissal of claim on First Amendment grounds, concluding "[t]he First Amendment is not violated so long as resolution of a claim does not require the court to choose between competing interpretations of religious tenets or to interfere with a church's autonomy rights."); *Burrows v. Brady*, 605 A.2d 1312, 1315 (R.I. 1992) (concluding, in dispute about visitation rights, "when evaluating what is in the best interests of a child, a trial justice has the authority to consider the religious beliefs or disbeliefs of the child's parents, as the issue relates to the best interests of the child, without running afoul of the Constitution."); *see also Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 346 (D.C. 2005) (rejecting argument that consideration of motion to compel arbitration regarding governing structure of religious organization would impermissibly entangle the court in ecclesiastical

matters, concluding that "well-established neutral principles of contract law can be used," and the court therefore had "jurisdiction consistent with the First Amendment"); *cf. Whittaker v. Sandford*, 85 A. 399 (Me. 1912) (affirming verdict against leader of religious sect for false imprisonment).

The Texas Supreme Court's decision likewise conflicts with decisions rejecting free exercise challenges to laws governing religiously-motivated conduct that threatens the safety, welfare or bodily integrity of others. *See, e.g., United States v. Amer*, 110 F.3d 873, 879 (2d Cir. 1997) (rejecting claim that conviction under International Parental Kidnapping Crime Act "infringes on the free exercise of religion by proscribing removals of children from the United States even when those acts are dictated, or at least motivated, by 'religious law' . . . because the Act punishes parental kidnappings solely for the harm they cause"); *State v. Pack*, 527 S.W.2d 99, 107, 113 (Tenn. 1975) (noting the "belief-action dichotomy has been the subject of numerous decisions of the Supreme Court of the United States," and holding that "the handling of snakes as a part of religious ritual is a common law nuisance" and ordering injunction against handling dangerous and poisonous snakes, even as part of a religious ceremony of consenting adults); *see also Heard v. Johnson*, 810 A.2d 871, 885 (D.C. 2002) ("Torts such as battery, false imprisonment or conversion probably would fall within the exception to church immunity . . . because they pose a 'substantial threat to public safety, peace or order.'") (quoting *Sherbert*, 374 U.S. at 403); *Planned Parenthood of Mid-Iowa v.*

Maki, 478 N.W.2d 637, 640 (Iowa 1991) (applying *Smith* in rejecting claim that a permanent injunction preventing religiously-motivated abortion opponent from obstructing access to or egress from Planned Parenthood location infringed on right to freedom of religion).

The Texas Supreme Court Majority exacerbates its deviation from these cases by speciously invoking the concept of "consent" to justify the dismissal of Ms. Schubert's claims. Specifically, the Majority maintained that "religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church." 24a-25a.

Of course, in making this point the Majority elides the fact that the jury conclusively determined Ms. Schubert did not consent to the physical invasion at issue.[48] The Texas Supreme Court's determination that the Free Exercise Clause requires immunity for a tortfeasor even when a victim resists or refuses consent to participate in a religiously-motivated act by the tortfeasor conflicts with the view of the Oklahoma Supreme Court, which appropriately explained: "Just as freedom to worship is protected by the First Amendment, so also is the liberty *to recede* from one's religious

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[48] Instructed in accordance with Texas law, the jury found that Ms. Schubert was detained "against her consent." 62a. *See also supra* note 31.

allegiance." *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 776 (Okla. 1989) (emphasis in original). "No real freedom to choose religion would exist in this land if under shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts." *Id.* at 779; *cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (describing "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men.") (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TEXAS

NO. 05-0916

PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON, PETITIONERS,

V.

LAURA SCHUBERT, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued April 12, 2007

JUSTICE MEDINA delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, and JUSTICE WILLETT joined.

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE GREEN joined, and in Parts II-A, III, and IV of which JUSTICE JOHNSON joined.

JUSTICE GREEN filed a dissenting opinion.

JUSTICE JOHNSON filed a dissenting opinion.

This appeal concerns the tension between a church's right to protection under the Free Exercise Clause of the First Amendment and a church member's right to judicial redress under a claim for intentional tort. U.S. CONST. amend. I; *see also* TEX. CONST. art. I, § 6. The court of appeals generally affirmed the judgment in favor of the church member, concluding, among other things, that the church was judicially estopped to claim First Amendment protection. 174 S.W.3d 388, 405-07. We conclude, however, that the church was not judicially estopped to assert its constitutional rights. We further conclude the case, as tried, presents an ecclesiastical dispute over religious conduct that would unconstitutionally entangle the court in matters of church doctrine and, accordingly, reverse the court of appeals' judgment and dismiss the case.

I

On Saturday June 8, 1996, Tom and Judy Schubert left town, leaving their three teenage children at home. While the Schuberts were away, their seventeen-year-old daughter, Laura, spent much of her time at the family's church, Pleasant Glade Assembly of God,[1] participating in church-related activities.

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[1] The Assembly of God Church is "[t]he largest denomination to stem from the Pentecostal movement of the early twentieth century . . . American Pentecostal leaders agreed to form a simple fellowship of churches within the name 'Assemblies of God' as a scriptural designation . . . Assemblies of God describe

On Friday evening, before her parents left town, Laura attended a youth group activity at Pleasant Glade in preparation for a garage sale the next day. The atmosphere during this event became spiritually charged after one of the youth announced he had seen a demon near the sanctuary. The youth minister, Rod Linzay, thereupon called the group together to hear the story, and after hearing it, agreed that demons were indeed present. Linzay instructed the youth to anoint everything in the church with holy oil and led a spirited effort throughout the night to cast out the demons. Finally, on Saturday morning at about 4:30 a.m., Linzay gathered the exhausted youth together to announce that he had seen a cloud of the presence of God fill the church and that God had revealed a vision to him. Although exhausted, the young people assisted with the garage sale later that morning.

At the Sunday morning worship service the next day, several young people gave testimonials about the spiritual events of the preceding day. At the conclusion of the service, the youth, including Laura and her brother, prayed at the altar. During these prayers, Laura's brother became "slain in the

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themselves as 'Pentecostal in experience, evangelical in outlook, and fundamental in their approach to the Bible.'" THE NEW INTERNATIONAL DICTIONARY OF THE CHRISTIAN CHURCH 78-79 (1978). The Church believes in the literal teachings of the Bible with respect to spirits, demons, demon possession, and the "casting out" of demons. WHERE WE STAND: THE OFFICIAL POSITION PAPERS OF THE ASSEMBLIES OF GOD 15-23 (1994).

spirit,"[2] collapsing to the floor where church members continued to pray into the early afternoon.

Later that afternoon, Laura returned to church for another youth activity and the Sunday evening worship service. During the evening service, Laura collapsed. After her collapse, several church members took Laura to a classroom where they "laid hands" on her and prayed. According to Laura, church members forcibly held her arms crossed over her chest, despite her demands to be freed. According to those present, Laura clenched her fists, gritted her teeth, foamed at the mouth, made guttural noises, cried, yelled, kicked, sweated, and hallucinated. The parties sharply dispute whether these actions were the cause or the result of her physical restraint.

Church members, moreover, disagreed about whether Laura's actions were a ploy for attention or the result of spiritual activity. Laura stated during the episode that Satan or demons were trying to get her. After the episode, Laura also allegedly began

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[2] Lloyd McCutchen, Pleasant Glade's senior pastor, explained "slain in the spirit" as:

> [A] biblical experience related in several accounts of the Bible. When this happens, a person often faints into semi-consciousness, and sometimes lies down on the floor of our church. It is our belief that this is a positive experience in which the holy spirit comes over a person and influences them. It is our belief that the holy spirit is not the only spirit that can influence a person. Evil spirits can move and can torment persons.

telling other church members about a "vision." Yet, her collapse and subsequent reaction to being restrained may also have been the result of fatigue and hypoglycemia. Laura had not eaten anything substantive that day and had missed sleep because of the spiritual activities that weekend. Whatever the cause, Laura was eventually released after she calmed down and complied with requests to say the name "Jesus."

On Monday and Tuesday, Laura continued to participate in church-related activities without any problems, raising money for Vacation Bible School and preparing for youth drama productions. Her parents returned from their trip on Tuesday afternoon.

On Wednesday evening, Laura attended the weekly youth service presided by Rod Linzay. According to Linzay, Laura began to act in a manner similar to the Sunday evening episode. Laura testified that she curled up into a fetal position because she wanted to be left alone. Church members, however, took her unusual posture as a sign of distress. At some point, Laura collapsed and writhed on the floor. Again, there is conflicting evidence about whether Laura's actions were the cause or result of being physically restrained by church members and about the duration and force of the restraint. According to Laura, the youth, under the direction of Linzay and his wife, Holly, held her down. Laura testified, moreover, that she was held in a "spread eagle" position with several youth members holding down her arms and legs. The church's senior pastor, Lloyd McCutchen, was summoned to the youth hall where he played a tape

of pacifying music, placed his hand on Laura's forehead, and prayed. During the incident, Laura suffered carpet burns, a scrape on her back, and bruises on her wrists and shoulders. Laura's parents were subsequently called to the church. After collecting their daughter, the Schuberts took her out for a meal and then home. Laura did not mention her scrapes and bruises to her parents that night.

In July, Laura's father, himself an Assembly of God pastor and missionary, met twice with Senior Pastor McCutchen to discuss the June incidents and the youth ministry. Following those conversations, Senior Pastor McCutchen took the matter to the board of deacons and met with Linzay to discuss theology. Linzay assured McCutchen "that neither he nor Holly believe that Christians can be demon possessed." After meeting with Linzay, McCutchen spent an hour with the youth group to clarify the biblical doctrine of angels, fallen angels, and demonic possession. McCutchen reported his actions to Laura's father in a letter on July 22.

A few days later, Laura's father responded to McCutchen's letter, discussing at length Laura's version of the spiritually charged atmosphere surrounding the weekend of June 7-9 and the following Wednesday evening youth service on June 12. In addition, he stated that Laura "ha[d] started having terrible nightmares" and had felt "that a demon [was] in her room at night." Because missionaries "can not get into local church affairs," Laura's father concluded by asking the senior pastor to investigate the matter further, adding "I am placing this situation in your hands and hope God

gives you wisdom." The Schuberts subsequently left Pleasant Glade to attend another church.

Over the next months, several psychologists and psychiatrists examined Laura, documenting her multiple symptoms, such as angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia. Despite the psychiatric counseling, Laura became increasingly depressed and suicidal, eventually dropping out of her senior year of high school and abandoning her former plan to attend Bible College and pursue missionary work. Finally, in November 1996, Laura was diagnosed as suffering from post-traumatic stress disorder, which the doctors associated with her physical restraint at the church in June 1996. One of the expert witnesses at trial testified that Laura would "require extensive time to recover trust in authorities, spiritual leaders, and her life-long religious faith." Ultimately, Laura was classified as disabled by the Social Security Administration and began drawing a monthly disability check.

Thereafter, Laura and her parents sued Pleasant Glade, the senior pastor, the youth minister, and other members of the church, alleging negligence, gross negligence, professional negligence, intentional infliction of emotional distress, false imprisonment, assault, battery, loss of consortium, and child abuse. The Schuberts further claimed that the defendants' conduct had caused Laura "mental, emotional and psychological injuries including physical pain, mental anguish, fear, humiliation, embarrassment, physical and emotional distress, post-traumatic stress disorder[,] and loss of

employment." The Schuberts' petition detailed the June spiritual events at the church leading to Laura's breakdown.

In response, Pleasant Glade and the other defendants sought a protective order and moved to dismiss the Schuberts' lawsuit as an unconstitutional burden on their religious practices, describing the litigation as "a dispute regarding how services should be conducted within a church, including the practice of 'laying on of hands.'" The trial court denied both motions.

In the mandamus proceeding that followed, the court of appeals granted the church's request for relief, agreeing that the Schuberts' "religious" claims were barred by the First Amendment because they "involve[d] a searching inquiry into Assembly of God beliefs and the validity of such beliefs." *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 89 (Tex. App.–Fort Worth 1998, orig. proceeding). The court defined "religious" claims to include the Schuberts' claims of negligence, gross negligence, professional negligence, intentional infliction of emotional distress, child abuse, and loss of Laura's consortium. *Id.* at 90. The church did not ask for mandamus protection from Laura's claims of false imprisonment and assault, and those claims were not included in the court's definition of religious claims. *Id.* at 88 n.3.

Following the mandamus proceeding, the trial court signed a protective order, prohibiting the Schuberts from inquiring into or debating the religious teachings, practices, or beliefs of the Pentecostal or Assembly of God churches. Laura's

remaining claims proceeded to trial, where a jury found that Laura had been assaulted and falsely imprisoned by the senior pastor, the youth minister, and several church members. The jury apportioned liability among these defendants, attributing fifty percent to the senior pastor, twenty-five percent to the youth minister, and the remainder to the other defendants. Finally, the jury awarded Laura damages of $300,000 for her pain and suffering, loss of earning capacity, and medical expenses. Following the verdict, Laura moved for judgment, and Pleasant Glade moved for judgment notwithstanding the verdict, asserting once again its free exercise rights under the state and federal constitutions. The trial court rendered judgment on the jury's verdict of false imprisonment, awarding Laura the damages found by the jury and adding Pleasant Glade as a judgment debtor with joint and several liability for the amounts apportioned to its senior pastor and youth minister. Pleasant Glade and the other defendants appealed.

The court of appeals eliminated the damages awarded for lost earning capacity, concluding that these damages were too remote and speculative, but otherwise affirmed the trial court's judgment in Laura's favor. 174 S.W.3d at 399, 408. Regarding the First Amendment claim, the court concluded that the church and pastors were judicially estopped to assert their constitutional rights because they had taken a contrary position in the previous mandamus proceeding by allowing Laura's claims of assault, battery, and false imprisonment "to go forward." *Id.* at 407.

II

The doctrine of judicial estoppel "precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding." 2 ROY W. MCDONALD & ELAINE G. CARLSON, TEXAS CIVIL PRACTICE § 9.51 at 576 (2d ed. 2003). Contradictory positions taken in the same proceeding may raise issues of judicial admission but do not invoke the doctrine of judicial estoppel. *See Galley v. Apollo Associated Servs., Ltd.*, 177 S.W.3d 523, 529 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("Judicial estoppel does not apply to contradictory positions taken in the same proceeding"). The doctrine is not strictly speaking estoppel, but rather is a rule of procedure based on justice and sound public policy. *Long v. Knox*, 291 S.W.2d 292, 295 (Tex. 1956). Its essential function "is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage." *Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 650 (Tex. App.—El Paso 1997, writ denied); *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (noting basis for estoppel is the assertion of a position clearly inconsistent with a previous position accepted by the court); *Tenneco Chem. v. William T. Burnett & Co.*, 691 F.2d 658, 665 (4th Cir. 1982) (finding "the determinative factor is whether the appellant intentionally misled the court to gain an unfair advantage").

The doctrine does not apply to the church's free exercise claim here for at least three reasons: (1) the asserted inconsistency did not arise in a prior proceeding, but in this same case; (2) the church did

not gain any advantage from the asserted inconsistency; and, most importantly, (3) the church has consistently asserted its First Amendment rights throughout this case, including the mandamus proceeding in which it sought relief from certain tort claims implicating church beliefs and practices. *See In re Pleasant Glade Assembly of God*, 991 S.W.2d at 89.

In that proceeding, the court of appeals agreed with the church that the Schuberts' claims of negligence, professional negligence, intentional infliction of emotional distress, and child abuse involved "not only the appropriateness of attempting to cast demons out of Laura" but also how the pastors' "prayers and comments about demons from June 7 to June 12 affected Laura." *Id.* Whether the defendants had intentionally or negligently misapplied church doctrine to Laura during these events was not a justiciable controversy, according to the court, because the "First Amendment [gave] Pleasant Glade the right to engage in driving out demons." *Id.* Pleasant Glade, however, did not seek mandamus relief for Laura's "pure bodily injury claims of assault, battery and false imprisonment." It is this omission from Pleasant Glade's mandamus petition that the court of appeals now views as an estoppel to the church's present First Amendment claim.

Pleasant Glade's petition for writ of mandamus, however, stated in relevant part:

> Plaintiff, Laura Schubert, a teenager, does bring a *secular complaint* against the church and its pastors. It begins

when, according to her own pleading, she "collapsed" while standing at the altar of the church during a church service. She alleges she was physically grasped, taken and held on the floor of the Church against her will. *This was allegedly done as part of an "exorcism" in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant.* Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. *This is a "bodily injury" claim . . . Relators, the church and the pastors, concede that this is a "secular controversy" and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . . . .*

* * *

. . . If this were the sum total of this dispute, Relators would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue. *Therefore, Relators do not request that this Court issue mandamus to stop litigation of this "secular controversy for bodily injury."*

(emphasis added). From this, it would appear that Pleasant Glade viewed Laura's claims of emotional damages as religious in nature; whereas any claim for physical injury, the church deemed secular. Based on this characterization, Pleasant Glade only sought mandamus relief for Laura's emotional injuries.

The court of appeals, however, observed that "[h]aving obtained, in the prior mandamus proceeding, the dismissal of all but Laura's assault and false imprisonment claims, which they swore under oath should 'go forward' because they were purely secular and entitled to no First Amendment protections, [Pleasant Glade] cannot now 'play fast and loose' with the judicial system by taking the opposite position in this appeal to suit their own purposes." 174 S.W.3d at 407. The court then held the "church and pastors [were] [judicially] estopped from asserting in this appeal that they are entitled to First Amendment protections with regard to Laura's assault and false imprisonment claims." *Id.*

Pleasant Glade's mandamus petition, however, merely distinguished Laura's bodily injury claims from her emotional damage claims. That distinction is consistent with its present appellate contention that the award of damages for Laura's emotional injury is barred by the First Amendment. It is not apparent, therefore, how Pleasant Glade's previous concession that Laura's purely physical injuries were secular, rather than religious in nature, is inconsistent with the church's present position. Pleasant Glade argues on appeal that the First Amendment protects it from liability for Laura's emotional injuries connected with its

religious practices, and the court of appeals agreed in its mandamus opinion that the conduct alleged in the Schuberts' petition was "inexorably intertwined with Pleasant Glade's religious beliefs" and thus protected under the First Amendment. *In re Pleasant Glade Assembly of God*, 991 S.W.2d at 90.

Nor is it apparent how Pleasant Glade has obtained an unfair advantage by omitting the assault and false imprisonment claims from its mandamus request. But aside from that, even assuming the church's mandamus and appellate contentions were contradictory, the mandamus proceeding is a part of this case, not some prior proceeding. Judicial estoppel does not apply to contradictory positions taken in the same proceeding. *Galley*, 177 S.W.3d at 529; *see Starcrest Trust v. Berry*, 926 S.W.2d 343, 355 (Tex. App.—Austin 1996, no writ); *Estate of Dewitt*, 758 S.W.2d 601, 603 (Tex. App.—Amarillo 1988, writ denied).

In conclusion, it is not apparent why Pleasant Glade's failure to ask for additional mandamus relief should foreclose its present request for appellate review. Certainly, the doctrine of judicial estoppel does not require this. Thus, we hold that the church is not estopped to assert its First Amendment defense.

III

Because Pleasant Glade is not judicially estopped, we next consider whether the church's religious practice of "laying hands" is entitled to First Amendment protection. Pleasant Glade contends the First Amendment protects it against claims of intangible harm derived from its religious

practice of "laying hands." The church relies on *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987), for this proposition.

In *Paul*, the Ninth Circuit was asked to determine whether the Jehovah's Witness' practice of shunning was protected by the Free Exercise Clause. 819 F.2d at 878. After being excommunicated from the church, the plaintiff brought suit against the congregation, alleging common law torts of defamation, invasion of privacy, fraud, and outrageous conduct. *Id.* at 877. Because the church's practice of shunning was exclusively based on their interpretation of canonical text, the court found "[t]he harms suffered by Paul as a result of her shunning by the Jehovah's Witnesses are clearly not of the type that would justify the imposition of tort liability for religious conduct." *Id.* at 883. In particular, the Ninth Circuit held that "[i]ntangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practice – or against its members." *Id.* Therefore, "[a] religious organization has a defense of constitutional privilege to claims that it has caused intangible harms – in most, if not all, circumstances." *Id.*

Laura asserted, however, that the events at the church caused her both physical and emotional injury, and the church concedes that the First Amendment does not protect it from Laura's claim of physical injury. But Laura's case was not about her physical injuries. Although she suffered scrapes and bruises during these events, her proof at trial related solely to her subsequent emotional or psychological

injuries. Laura testified about her fear and anxiety during these events, recalling that she had hallucinated, had trouble breathing, feared that her leg might be broken, and feared that she might die. Her memory of the experience also included many details. She could name the people who held her, where they had placed their hands, and even in whose lap her head rested during part of her ordeal. She also remembered being given water to drink, being walked with, and having a cold compress held to her forehead. Her final memory of the Wednesday evening episode was of her parents coming to take her home and walking with her father in the sanctuary. She could not recall events after that, including her family's stop at a restaurant for dinner on the way home. Laura did not assert that the church-related events had caused her any physical impairment or disfigurement. She did not complain of physical injury that night, and her scrapes and bruises went unnoticed until the next morning when she showed them to her parents. Her medical proof at trial was also not about physical injury but about her psychological evaluations and treatment. Under this record, any claim of physical pain appears inseparable from that of her emotional injuries.

Indeed, her case at trial was not significantly different from what she would have presented under her claim of intentional infliction of emotional distress, a claim the court of appeals agreed should be dismissed. *In re Pleasant Glade Assembly of God*, 991 S.W.2d at 90. We have previously said that adjudication of this type of claim "would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the

Constitution." *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996). This type of intangible, psychological injury, without more, cannot ordinarily serve as a basis for a tort claim against a church or its members for its religious practices. *See Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (holding that the intangible harms caused by playing religious records to the public is insufficient to impose civil or criminal liability); *see also Murphy v. I.S.K. Con. of New Eng., Inc.*, 571 N.E.2d 340, 348 (Mass. 1991) (holding that the intangible harms caused by using "offensive" religious scriptures is not actionable).

CHIEF JUSTICE JEFFERSON's dissent asserts, however, that a court should use an instruction to separate the "damages only for the mental anguish the plaintiff would have suffered had the tort been committed by a secular actor in a secular setting." ___ S.W.3d. at ___ (Jefferson, C.J., dissenting). However, even Laura's psychological expert, Dr. Arthur Swen Helge, admitted that he could not separate the damages resulting from Laura's physical restraint and the psychological trauma resulting from the discussion of demons at the church.[3] Because of Dr. Helge's inability to separate

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[3] Before Dr. Helge was permitted to testify, he was questioned about the basis of his opinion:

> Q. Okay. In the – the course of gathering this information from Laura, did she tell you about chasing demons, being told about demons, being terrified about demons?
>
> A. Yes.

Q. And was that in the medical records that you wrote down, the statements about demons?

A. . . . I'm certain there's probably some reference to demons in there.

Q. And in the medical records you read, you saw those, too, references to demons and the spiritual activities that were going on at the church?

A. Yes.

Q. Okay. Do you believe that those traumatized Laura?

A. I believe that experience traumatized her.

Q. Okay. So, this – when you say Laura has been traumatized, you're talking about, in part, the experience about being told about demons, demons in her presence, demons around her, they need to get rid of demons, chase them away, beat on the walls of the church, anoint things with oil, that whole Friday night length of activity, you believe that's part of Laura Schubert being traumatized?

A. Yes, I do.

Q. Okay. Have you been asked to separate out – in order to render your opinion today, have you been asked to separate out what type of trauma Laura suffered from being told about demons as opposed to just physical activities, being held down on the floor, that sort of thing? Have you been asked to make that separation?

A. No.

Q. And it would be kind of hard for you to make that separation after having been given all the medical records that have all this spiritual matter in it, and having that all entered into

these damages, the church repeatedly objected that the witness not be allowed to testify.[4] Even if a jury could parse the emotional damages attributable solely to secular activity, which is doubtful, in *Westbrook v. Penley*, we emphasized that even

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your mind? . . . That would be hard – pretty hard to do, wouldn't it?

A. Yes.

[4] The church objected:

Q. Your Honor, . . . at this point, we would ask that Your Honor sustain our objection and exclude this witness from testifying about any trauma that Laura suffered because the witness has indicated that he has included both First Amendment protected activities, and the physical activities, and formed them into one opinion.

* * *

Q. Your Honor, . . . [w]e'd like to renew our motion to exclude the testimony of Dr. Helge. It's clear that not only has he mixed in the religious activities and included criticisms of telling Laura what to think, which is almost the definition of religious teaching, is telling a person what to think, and how to think. He has confused that in . . . [H]e has impermissibly combined protected religious activities with other activities, and so his opinion in testifying here in court would actually undercut the Court of Appeals opinion, circumvented, and effectively defeated by simply considering a lot of matters outside the courtroom and rendering an opinion about trauma, even if that trauma comes from religious experience.

though the elements of a common law tort may be *defined* by secular principles without regard to religion, it does not necessarily follow that *application* of those principles to impose civil tort liability would not run afoul of protections the constitution affords to a church's right to construe and administer church doctrine. 231 S.W.3d 389, 400 (Tex. 2007). In this case, although Laura's secular injury claims might theoretically be tried without mentioning religion, the imposition of tort liability for engaging in religious activity to which the church members adhere would have an unconstitutional "chilling effect" by compelling the church to abandon core principles of its religious beliefs. *See id.* at 397 ("While it might be theoretically true that a court could decide whether Westbrook breached a secular duty of confidentiality without having to resolve a theological question, that doesn't answer whether its doing so would unconstitutionally impede the church's authority to manage its own affairs."); *see also Paul*, 819 F.2d at 881 (noting that "[i]mposing tort liability for shunning on the Church would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings").

According to Pentecostal religious doctrine, whenever a person is believed to be under "spiritual influence," the church "lays hands" on the person and anoints oil to combat "evil forces." *See supra* note 2. Senior Pastor McCutchen, in an affidavit supporting the church's motion for summary judgment, explained the practice:

> . . . Many people did "lay hands" on Laura Schubert and pray [sic] for her,

according to the custom of our church. This type of activity happens on a very regular basis in our church, since we believe in the physical conduct of laying hands on persons in order to pray for them.

[ ] Within our church, it is not unusual for a person to be "slain in the spirit." This is a biblical experience, related in several accounts of the Bible. When this happens, a person often faints into semi-consciousness, and sometimes lies down on the floor of our church. It is our belief that this is a positive experience in which the holy spirit comes over a person and influences them. It is our belief that the holy spirit is not the only spirit that can influence a person. Evil spirits can move and can torment persons. Also, it is possible that a person (particularly a young dramatic person such as Laura Schubert) can take advantage of the attention that this activity brings. They can fake the entire experience in order to draw attention to themselves.

[ ] When a person comes forward in the service and begins having one of these experiences, it is sometimes difficult to discern whether: (1) the person is having a positive experience with the holy spirit, (2) whether there might be evil spirits engaged in

> warfare against the holy spirit, (3) whether there are emotional issues are [sic] involved, or (4) whether the person is faking the entire process in order to gain attention. Discerning between these various influences and factors is a matter on which even pastors within the church might disagree . . . .

Clearly, the act of "laying hands" is infused in Pleasant Glade's religious belief system. JUSTICE GREEN maintains in his dissent, however, that we "can and should decide cases like this according to neutral principles of tort law . . . [i]f a plaintiff's case can be made without relying on religious doctrine." ___ S.W.3d at ___ (Green, J., dissenting) (citing *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872, 876-90 (1990)). But, contrary to JUSTICE GREEN'S view, Laura's claims also involve church beliefs on demonic possession and how discussions about demons at the church affected Laura emotionally and psychologically.

Before the mandamus proceeding, the Schuberts sought discovery about the defendants' beliefs and practices, and, even before the litigation, Tom Schubert and Senior Pastor McCutchen discussed demonic possession and the appropriateness of exorcism in the church. This discussion caused McCutchen to meet with Rod Linzay to confirm the youth minister's theological understanding of church tenets, including the "laying of hands." In their original petition, the Schuberts alleged that Laura was in serious emotional and physical distress during the

Wednesday night youth service and did not want anyone touching her or praying for her. They further alleged she was restrained and held to the floor against her will and that an exorcism was performed in which the youth minister led the youth group in prayer, demanding that the Devil leave Laura's body. The Schuberts alleged that this restraint caused Laura's emotional injuries. However, because the religious practice of "laying hands" and church beliefs about demons are so closely intertwined with Laura's tort claim, assessing emotional damages against Pleasant Glade for engaging in these religious practices would unconstitutionally burden the church's right to free exercise and embroil this Court in an assessment of the propriety of those religious beliefs. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944); *see also Tilton*, 925 S.W.2d at 682.

Although the Free Exercise Clause does not categorically insulate religious conduct from judicial scrutiny, it prohibits courts from deciding issues of religious doctrine. *See Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *see also Westbrook*, 231 S.W.3d at 396. CHIEF JUSTICE JEFFERSON asserts, however, that we go too far in protecting religious doctrine in this case, and, in effect, eliminate mental anguish as an element of damage against tortfeasors who allege their conduct was motivated by religious conviction. ___ S.W.3d at ___ (Jefferson, C.J., dissenting). That, of course, is not our intent.

We do not mean to imply that "under the cloak of religion, persons may, with impunity," commit intentional torts upon their religious

adherents. *See Cantwell*, 310 U.S. at 306. Freedom to believe may be absolute, but freedom of conduct is not, and "conduct even under religious guise remains subject to regulation for the protection of society." *Tilton*, 925 S.W.2d at 677; *see generally Bowie v. Murphy*, 624 S.E.2d 74, 79-80 (Va. 2006) (defamation claim that deacon had been falsely accused of assaulting a church member); *Jones v. Trane*, 591 N.Y.S.2d 927, 931 (N.Y. 1992) (sexual misconduct of priest); *Strock v. Pressnell*, 527 N.E.2d 1235, 1237 (Ohio 1988) (minister's affair with wife of couple in marital counseling); *Hester v. Barnett*, 723 S.W.2d 544, 558-59 (Mo. Ct. App. 1987) (minister spread false accusations after family counseling); *Christofferson v. Church of Scientology*, 644 P.2d 577, 601-02 (Or. Ct. App. 1982) (fraudulent misrepresentations), *cert. denied*, 459 U.S. 1206 (1983). Moreover, religious practices that threaten the public's health, safety, or general welfare cannot be tolerated as protected religious belief. *See Tilton*, 925 S.W.2d at 677 (recognizing that free exercise clause does not protect actions "in violation of social duties or subversive to good order"); *see also Cantwell*, 310 U.S. at 306 (noting that religious solicitation does not disrupt the public's peace and good order); *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001) (religious conduct must not "pose some substantial threat to public safety, peace or order"); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 774 (Okla. 1989) (finding disciplinary action against parishioner not a threat to public safety, peace, or order). But religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to

greater latitude when applied to an adherent within the church. *See Smith v. Calvary Christian Church*, 614 N.W.2d 590, 593 (Mich. 2000) (tort claim rejected because of church member's consent to religious discipline as a matter of law); *Guinn*, 775 P.2d at 774 ("people may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them"). Particularly, when the adherent's claim, as here, involves only intangible, emotional damages allegedly caused by a sincerely held religious belief, courts must carefully scrutinize the circumstances so as not to become entangled in a religious dispute. *Murphy*, 571 N.E.2d at 346-48 (rejecting plaintiffs' claims of intentional infliction of emotional distress caused by scriptural passages that referred to women as evil and inferior to men); *Molko v. Holy Spirit Assn.*, 762 P.2d 46, 64 (Cal. 1988) (denying plaintiff's false imprisonment claim against church for telling plaintiff her family "would be damned in Hell forever" if she left the church); *Lewis v. Holy Spirit Assn. for the Unification of World Christianity*, 589 F. Supp. 10, 12 (D. Mass. 1982) (rejecting claim for "brainwashing and indoctrination" that led to plaintiff's "severe psychiatric disorders"); *Christofferson*, 644 P.2d at 580 (denying plaintiff's claim against church's alleged "scheme to gain control of [plaintiff's] mind"). And while we can imagine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct, this is not such a case.

The "laying of hands" and the presence of demons are part of the church's belief system and accepted as such by its adherents. These practices are not normally dangerous or unusual and apparently arise in the church with some regularity. They are thus to be expected and are accepted by those in the church. That a particular member may find the practice emotionally disturbing and non-consensual when applied to her does not transform the dispute into a secular matter. "Courts are not arbiters of religious interpretation," and the First Amendment does not cease to apply when parishioners disagree over church doctrine or practices because "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981). Because determining the circumstances of Laura's emotional injuries would, by its very nature, draw the Court into forbidden religious terrain, we conclude that Laura has failed to state a cognizable, secular claim in this case. *See Ballard*, 322 U.S. at 86.

* * *

The Free Exercise Clause prohibits courts from deciding issues of religious doctrine. Here, the psychological effect of church belief in demons and the appropriateness of its belief in "laying hands" are at issue. Because providing a remedy for the very real, but religiously motivated emotional distress in this case would require us to take sides in what is essentially a religious controversy, we cannot resolve

that dispute. Accordingly, we reverse the court of appeals' judgment and dismiss the case.

David M. Medina
Justice

Opinion delivered: June 27, 2008

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN, and by JUSTICE JOHNSON as to Parts II-A, III, and IV, dissenting.

After today, a tortfeasor need merely allege a religious motive to deprive a Texas court of jurisdiction to compensate his fellow congregant for emotional damages. This sweeping immunity is inconsistent with United States Supreme Court precedent and extends far beyond the protections our Constitution affords religious conduct. The First Amendment guards religious liberty; it does not sanction intentional abuse in religion's name. Because the Court's holding precludes recovery of emotional damages—even for assault and other serious torts—where the defendant alleges that the underlying assault was religious in nature, I respectfully dissent.

I

Ironically, much of my analysis mirrors that found in Pleasant Glade's earlier plea to the court of appeals. *See, e.g., infra* note 9. In its successful petition for a writ of mandamus, Pleasant Glade conceded that Schubert's claim for assault, battery, and false imprisonment presented a "'secular controversy' and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person." In the subsequent appeal, the court of appeals held that Pleasant Glade, having received mandamus relief to exclude religious references at trial, was precluded from raising a First Amendment defense that it had quite purposefully abandoned. 174 S.W.3d 388, 407. The

Court holds that it is not. In light of the Court's ultimate dismissal for want of jurisdiction, however, I find the Court's protracted discussion of judicial estoppel puzzling. Subject-matter jurisdiction cannot be conferred by estoppel, *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005), or waiver, *Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007), so the estoppel issue would seem, technically, beyond the Court's reach.[1] The Court has nevertheless expounded on this question, and because the Court errs in its analysis, I offer a brief rejoinder.

The Court states that Pleasant Glade is not judicially estopped from making its First Amendment arguments because, among other reasons, "the asserted inconsistency did not arise in a prior proceeding, but in this same case," __ S.W.3d __, __, and "[c]ontradictory positions taken in the same proceeding . . . do not invoke the doctrine of judicial estoppel," *id.* at __. That characterization misses the mark. The United States Supreme Court recently discussed the policy considerations underlying judicial estoppel and the rationale behind the requirement that parties succeed in a prior proceeding:

> [C]ourts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier

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[1] The fact that "[judicial estoppel] is not strictly speaking estoppel but rather is a rule of procedure", __ S.W.3d __, does not affect this analysis. *See Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294–95 (Tex. 2001) ("A party cannot by his own conduct confer jurisdiction on a court when none exists otherwise.").

> position, so that judicial acceptance of an inconsistent position in a later proceeding would create *the perception that either the first or the second court was misled*. Absent success in a prior proceeding, a party's later inconsistent position introduces *no risk of inconsistent court determinations*, and thus poses little threat to judicial integrity.

New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (citations omitted) (emphasis added). This Court's formalistic conception of "prior proceedings" will fail to capture many situations that implicate these concerns. If a party obtains mandamus relief from this Court by taking one position and then wins a judgment, also from this Court, as part of the same suit and based on the opposite contention, this no less creates the "perception that either the first or the second court was misled" and presents the "risk of inconsistent court determinations" than if the mandamus proceeding had originated from a different action. *Id.* The appropriate test to determine if there has been a prior proceeding for the purposes of judicial estoppel is whether the court has made a ruling—or "determination"—on the issue. *Id.* Thus, parties would be able to reverse course before the court has ruled, but could be bound by their previous position once successful (and if the other elements of judicial estoppel are present).[2]

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[2] Courts have the option of reversing their previous determination rather than invoking judicial estoppel, thus holding the party to the second of its inconsistent arguments

Although I agree, for the reasons discussed below, *see infra* n. 12, that Pleasant Glade is not estopped under these facts, the Court arrives at the estoppel question improvidently and reaches a conclusion that will limit Texas courts' ability to preserve judicial integrity.

II

A

The rights contained in the Free Exercise and Establishment Clauses are among our most cherished constitutional freedoms. As broad as these protections are, I agree with the Court that "'under the cloak of religion, persons may [not], with impunity,' commit intentional torts upon their religious adherents." __ S.W.3d at __ (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)). Unfortunately, this is precisely what the Court's holding allows. Here, assuming all facts favorable to the verdict, members of Pleasant Glade restrained Schubert on two separate occasions against her will. During the first encounter, seven members pinned her to the floor for *two hours* while she cried, screamed, kicked, flailed, and demanded to be released. This violent act caused Schubert multiple bruises, carpet burns, scrapes, and injuries to her wrists, shoulders, and back. As she testified, "I was being grabbed by my wrists, on my ankles, on my shoulders, everywhere. I was fighting with everything I had to get up, I was telling them, no. I

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rather than the first. *See New Hampshire*, 532 U.S. at 750 ("Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by a court at its discretion.") (citations omitted).

was telling them, let go, leave me alone. They did not respond at all." After Schubert "complied with what they wanted [her] to do," she was temporarily released. Fifteen minutes later, at the direction of Pleasant Glade's youth pastor, a different group of seven church members physically restrained her for an hour longer. After this experience, Schubert was "weak from exhaustion" and could hardly stand.

Three days later, a male church member approached Schubert after a service and put his arm around her shoulders. At this point, Schubert was still trying to figure out "what had happened" at the previous incident, "wasn't interested in being touched," and resisted him. As Schubert testified, "I tried to scoot away from him. He scooted closer. He was more persistent. Finally, his grasp on me just got hard . . . before I knew it, I was being grabbed again." Eight members of Pleasant Glade then proceeded to hold the crying, screaming, seventeen year-old Schubert spread-eagle on the floor as she thrashed, attempting to break free. After this attack, Schubert was unable to stand without assistance and has no recollection of events immediately afterward. On both occasions, Schubert was scared and in pain, feeling that she could not breathe and that "somebody was going to break [her] leg," not knowing "what was going to happen next."

The jury found that petitioners assaulted and falsely imprisoned Schubert, and the trial court rendered judgment for her on the false imprisonment claim. Although this case presents an unusual set of facts, involving physical restraint not proven to be part of any established church practice, at its core the case is about secular, intentional tort

claims squarely within our jurisdiction, and I believe the Court errs in dismissing for want thereof. I will address each of the Court's arguments in turn. First, the Court states that because Schubert's "proof at trial related solely to her subsequent emotional or psychological injuries," her "case at trial then was not significantly different from what she would have presented under her claim of intentional infliction of emotional distress . . . [a] type of claim [that] would necessarily require an inquiry into the truth or falsity of religious beliefs that is forbidden by the Constitution." __ S.W.3d at __ (citations omitted). As an initial matter, this is factually inaccurate. Schubert testified that she suffered *physical* as well as emotional injuries from the assaults. Furthermore, the jury awarded damages for unsegregated past "physical pain and mental anguish." Pleasant Glade did not request that the damages be segregated, and so waived any complaint that her physical injuries were not compensable. TEX. R. CIV. P. 274.

More importantly, the Court's allusion to intentional infliction of emotional distress fails to explain how submitting Schubert's emotional damages claim would "require an inquiry into the truth or falsity of religious beliefs," "embroil this Court in an assessment of the propriety of . . . religious beliefs," or "decid[e] issues of religious doctrine." __ S.W.3d at __, __, __ (citations omitted). In *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996), we held that intentional infliction of emotional distress claims based on insincere religious representations and breached promises to read, touch, and pray over tithes and prayer

requests were barred by the First Amendment. We explained:

> One of the elements that a plaintiff must prove to establish intentional infliction of emotional distress is that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." With regard to religious representations, we conclude that no conscientious fact finder would make such a determination without at least considering the objective truth or falsity of the defendants' beliefs, regardless of what evidentiary exclusions or limiting instructions were attempted. After all, the outrageousness and extremity of a representation is, under almost any circumstance, aggravated by being false or mitigated by being true.

925 S.W.2d at 681. This case is not like *Tilton*. False imprisonment does not require a showing of outrageous conduct.[3] Evaluating whether Pleasant

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[3] The elements of intentional infliction of emotional distress are: "(1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress that the plaintiff suffered was severe." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000). The elements of false imprisonment, on the other hand, are "(1) willful detention; (2) without consent; and (3) without authority

Glade falsely imprisoned Schubert does not require the factfinder to determine "the objective truth or falsity of the defendants' belief," *id.*, and neither does awarding her emotional damages. It is a basic tenet of tort law that emotional damages may be recovered for intentional torts involving physical invasions, such as assault, battery, and false imprisonment. *See, e.g., Dillard Dep't Stores, Inc. v. Silva*, 148 S.W.3d 370, 374 (Tex. 2004) (affirming award of mental anguish damages for false imprisonment); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex. 1967) ("Personal indignity is the essence of an action for battery."); *Davidson v. Lee*, 139 S.W. 904, 907 (Tex. Civ. App.—Galveston 1911, writ ref'd) ("The rule that damages cannot be recovered for mental suffering unaccompanied by physical injury is not applicable when the wrong complained of is a willful one intended by the wrongdoer to wound the feelings and produce mental anguish and suffering, or from which such result should be reasonably anticipated, as a natural consequence."); RESTATEMENT (SECOND) OF TORTS, § 905 cmt. c (1965) ("The principal element of damages in actions for battery, assault or false imprisonment . . . is frequently the disagreeable emotion experienced by the plaintiff."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 11 (5th ed. 1984) ("Since the injury [resulting from false imprisonment] is in large part a mental one, the plaintiff is entitled to damages for mental suffering, humiliation, and the like."); 20 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 331.06

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of law." *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002).

(2007) ("Mental suffering caused by a false imprisonment, including humiliation, shame, fright, and anguish, is also compensable, regardless of whether any physical harm was inflicted on the plaintiff."); *cf. Boyles v. Kerr*, 855 S.W.2d 593, 597–98 (Tex. 1993) ("Our decision [that there is no general duty not to negligently inflict emotional distress] does not affect a claimant's right to recover mental anguish damages caused by defendant's breach of some other legal duty . . . . *We also are not imposing a requirement that emotional distress manifest itself physically to be compensable.*") (emphasis added) (citations omitted). This is common sense: many experiences—including some sexual assaults and certain forms of torture—are extremely traumatic yet result in no serious physical injury.

Given this, it is not surprising that the Court cites no case holding that the First Amendment bars claims for emotional damages arising from assault, battery, false imprisonment, or similar torts. I can cite a case, heavily relied upon by the Court, for the opposite proposition: *Tilton*. There we held that "[t]he Free Exercise Clause never has immunized clergy or churches from all causes of action alleging tortious conduct," and cited *Meroni v. Holy Spirit Association for the Unification of World Christianity*, 119 A.D.2d 200 (N.Y. App. Div. 1986), with the parenthetical "'[A] church may be held liable for intentional tortious conduct on behalf of its officers or members, even if that conduct is carried out as part of the Church's religious practices.'" *Tilton*, 925 S.W.2d at 677. The Court cites *Cantwell v. Connecticut*, 310 U.S. at 310, for the proposition that

"intangible harms" are "insufficient to impose civil or criminal liability." __ S.W.3d at __. The *Cantwell* Court, however, found in that case "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse," and made clear that "violence and breaches of the peace," such as occurred in this case, may be punished. *Cantwell,* 310 U.S. at 310. The Court also discusses *Paul v. Watchtower Bible & Tract Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987), but that case rested on the fact that "[n]o physical assault or battery occurred." *Paul*, 819 F.2d at 883. Similarly, in *Westbrook v. Penley*, we cited the "[n]o physical assault" language from *Paul* and stated that the act at issue was not "an intentional tort that endangered Penley's or the public's health or safety." 231 S.W.3d 389, 404 (Tex. 2007).[4]

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[4] In contrast, the tort of intentional infliction of emotional distress was developed because it was thought that extreme and outrageous conduct should be actionable *despite* the lack of a physical invasion or another otherwise tortious act, and is sometimes criticized *because* it compensates plaintiffs for mental anguish not naturally flowing from such an act, which may be mere speech. *See* RESTATEMENT (SECOND) OF TORTS, § 46 cmt. b (1965) ("[E]motional distress may be an element of damages in many cases where other interests have been invaded, and tort liability has arisen apart from the emotional distress. Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone. It is only within recent years that the rule stated in this Section has been fully recognized as a separate and distinct basis of tort liability, without the presence of the elements necessary to any other tort, *such as*

I agree with the Court that certain claims for emotional damages are barred by the First Amendment—if Schubert were merely complaining of being expelled from the church, she would have no claim in the civil courts. But again, this case, as it was tried, is not about beliefs or "intangible harms"—it is about violent action—specifically, twice pinning a screaming, crying teenage girl to the floor for extended periods of time. That was how it was presented to the jury, which *heard almost nothing about religion during the trial* due to the trial court's diligent attempt to circumvent First Amendment problems and to honor the court of appeals' mandamus ruling that neither side introduce religion as a reason for Laura's restraint.[5] Indeed, the trial court told the jury at the beginning of the case that "the Court of Appeals, the appellate courts, have instructed us that we don't get into spiritual matters because it would violate the [E]stablishment [C]lause of the First Amendment of the Constitution," and later repeated this instruction. That the Court looks to a dictionary for

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assault, battery, false imprisonment, trespass to land, or the like.") (emphasis added).

[5] In order to reach the conclusion that "the religious practice of 'laying hands' and church beliefs about demons are [] closely intertwined with Laura's tort claim," the Court quotes testimony on Pleasant Glade's religious beliefs and practices that the jury did not hear, and references claims made in Schubert's original, unamended petition, __ S.W.3d at __, which was filed before Pleasant Glade's successful mandamus petition, *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 87-88 (Tex. App.—Fort Worth 1998, orig. proceeding). Schubert subsequently amended her petition, and the live pleading in this case makes reference to neither "exorcism" nor "the Devil."

evidence of Pleasant Glade's beliefs and practices is proof of the trial court's success in keeping religion out of the courtroom. *See* __ S.W.3d at __, n. 2. Thus, the Court's assertion that assessing emotional damages against Pleasant Glade for engaging in these religious practices "would . . . embroil this Court in an assessment of the propriety of those religious beliefs" is belied by the conduct of this very case: Schubert testified that she was "grabbed" after collapsing due to illness; Pleasant Glade contested that version of events without reference to demons, "laying of hands," or other religious subjects, __ S.W.3d at __; and the jury was able to award damages without considering—or even being informed of—Pleasant Glade's beliefs.[6]

Further, although the Court chooses to conduct its own inquiry into the role of "laying hands" in Pleasant Glade's religion,[7] and attempts to limit its holding by stating that "religious practices that threaten the public's health, safety, or general

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[6] As discussed below, I think it possible that some of Schubert's emotional damages stemmed from protected religious speech and should not have been awarded. Pleasant Glade failed to preserve error on this point, however, and the Court errs in holding *all* of Schubert's damages—some of which certainly resulted from the restraint itself—barred. *See infra* Part II.B.

[7] In reaching the conclusion that "the act of 'laying hands' is infused in Pleasant Glade's religious belief system," __ S.W. 3d at __, the Court engages in the unconstitutional conduct it purports to avoid: "deciding issues of religious doctrine." *Id.* at __; *see Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

welfare cannot be tolerated," and thus that there may be some cases in which emotional damages are available as a consequence of religiously motivated conduct, __ S.W.3d at __, any religious motivation Pleasant Glade may have had is irrelevant to our consideration. The tort of false imprisonment is a religiously neutral law of general applicability, and the First Amendment provides no protection against it. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).") (citations omitted); *Moses v. Diocese of Colo.*, 863 P.2d 310, 320 (Colo. 1993) ("Application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution."). The *Smith* Court emphatically rejected the proposition that the First Amendment alone—without being coupled to another constitutional protection, such as the freedom of speech, the press, or to direct the education of one's children, 494 U.S. at 881—"could excuse [an individual] from compliance," *id.* at 879, with a general applicable law:

> Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of

> the land, and in effect to permit every citizen to become a law unto himself.

Id. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).[8]

To be clear, even if it had been proven at trial that Pleasant Glade's religion demanded that Schubert be restrained, the First Amendment would provide no defense—we simply need not evaluate the validity of Pleasant Glade's religious beliefs, or even inquire into the assailants' motives, to hold Pleasant Glade liable for its intentionally tortious conduct.[9]

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[8] The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, purported to overrule *Smith* by requiring a compelling state interest to substantially burden a person's religious practice. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Although the Court cites *Tilton* for support, *Tilton* did not consider the application of *Smith* because *Tilton* was decided before RFRA was held to be beyond Congress's legislative authority to enact with respect to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See Tilton*, 925 S.W.2d at 676 n.5 (noting that various courts had held RFRA constitutional). Thus, insofar as statements in *Tilton* conflict with *Smith*, they should no longer be considered authoritative.

[9] Even Pleasant Glade realizes this fundamental principle of First Amendment law. Its petition for writ of mandamus stated:

> [Schubert] alleges that she was physically grasped, taken and held on the floor of the church against her will. This was allegedly done as part of an "exorcism" in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant. Since Laura Schubert alleges she

And while the Court suggests that imposing this liability would have a "chilling effect" on the church's beliefs, __ S.W.3d at __, constitutional protection for illegal or tortious conduct cannot be bootstrapped from the protection of beliefs where it does not otherwise exist. Further, the Court's threat to "health, safety, or general welfare" test for liability for religiously motivated acts is almost identical to the "substantial threat to public safety, peace or order" language from *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). In *Smith*, however, the Court

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> was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. This is a "bodily injury" claim . . . Relators, the church and the pastors, concede that this is a "secular controversy" and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . . . .
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> * * *
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> If this were the sum total of this dispute, Relators would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue.

__ S.W.3d at __. Although the Court somehow concludes from this statement that "Pleasant Glade viewed the Schuberts' claims of emotional damages as religious in nature," it is plain from the text that the Church made no such distinction. And Pleasant Glade was correct not to do so: no religious beliefs are implicated by awarding Schubert mental anguish damages suffered as a result of her false imprisonment. *But cf. infra* note 12.

expressly rejected the application of *Sherbert*, which developed out of an unemployment compensation case, to "generally applicable prohibitions of socially harmful conduct." *Smith*, 494 U.S. at 885.[10]

And even under the Court's erroneous standard, it is hard to see why this case would not qualify. The torts of false imprisonment and assault both have substantially similar criminal analogs, *see* TEX. PENAL CODE §§ 20.02 ("Unlawful Restraint"), 22.01 ("Assault"), and it cannot be seriously argued from this record that Pleasant Glade's conduct did not threaten Schubert's welfare. It is difficult to determine what *would* meet the Court's standard, not least because the Court offers no analysis beyond its declaration that "this is not such a case." Finally, the Court hints that it might have found liability here if Schubert had been a passerby, but that "religious practices that might offend the rights or sensibilities of a non-believer outside the church are entitled to greater latitude when applied to an adherent within the church." __ S.W.3d at __. There is a kernel of truth in this statement, but the Court's formulation is imprecise and overbroad. Members of religious groups routinely and impliedly consent to a variety of faith-based practices. Accordingly, implied consent could, in many circumstances, extend to physical encounters like baptisms and to other

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[10] The Court cites *Sands v. Living Word Fellowship*, 34 P.3d 955, 958 (Alaska 2001), for the proposition that "religious conduct must not pose 'some substantial threat to public safety, peace or order.'" __ S.W.3d at __. This language is taken from *Sherbert* by way of *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979), and the *Sands* court did not analyze the effect of *Smith* on its precedent.

practices congregants embrace as part of their faith. And perhaps this type of implied consent could, in some circumstances, extend to being pinned to the floor for hours at a time despite the member's explicit, contemporaneous withdrawal of consent. That question is not before us today, however. Consent is a question of fact—indeed, lack of consent is an element of false imprisonment on which we have an affirmative jury finding in this case. Pleasant Glade did not challenge that finding at the court of appeals, and does not raise it here. Nevertheless, the Court treats church membership as an across the board buffer to tort liability.[11] The problems with this approach are obvious. It is impossible to apply the Court's standard in the absence of factual development or determination in the trial court. We are in no position to decide that the ordeal to which Schubert was subjected was so "expected" and "accepted by those in the church" as to overcome Schubert's vehement denial of consent at the time of the incidents. __ S.W.3d at __. Further, the scant evidence does not support the Court's conclusion. Senior Pastor McCutchen, in his affidavit quoted by the Court, speaks of "lay[ing] hands" and of church members "faint[ing] into semi-consciousness, and sometimes l[ying] down on the floor of our church." *Id.* at __. This is far removed from the incident described by Schubert, which we

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[11] While the Court cites *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 593 (Mich. 2000), that case is clearly inapposite. There, the plaintiff "explicitly consented in writing to obey the church's law," *id.*, and, in any case, the court specifically reserved the question of whether its reasoning would extend to church discipline "in violation of the Michigan Penal Code," *id.* at 595.

must take as true even if Pleasant Glade had properly raised this issue, *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) ("[L]egal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."), and lends no credence to the Court's consent theory.

B

To the extent that this case presents any First Amendment problems, I believe they lie in the fact that Schubert was traumatized not only by the false imprisonment viewed in isolation, but also by the religious content of that experience. Thus, because one of Schubert's experts, Dr. Helge, testified as to the whole of Schubert's mental anguish, the jury may have awarded damages stemming in part from the religious nature of the events in question. __ S.W.3d at __. This is prohibited by the First Amendment. *Paul*, 819 F.2d at 883. As discussed above, however, the general rule in Texas is that plaintiffs may recover mental anguish damages resulting directly from certain types of intentional torts, including false imprisonment. Thus, the difficulty in this type of hybrid case lies in separating the wheat from the chaff.

The Court solves this dilemma not by extracting the religious from the secular, but by binding them together and then dismissing the case for lack of jurisdiction. I would, instead, treat Pleasant Glade's First Amendment argument as an affirmative defense that must be raised at trial. *See* TEX. R. CIV. P. 94; *cf. Tilton*, 925 S.W.2d at 677

("[W]hen a plaintiff's suit implicates a defendant's free exercise rights, the defendant may assert the First Amendment as an affirmative defense to the claims against him."). A jury could then be instructed to award damages only for the mental anguish the plaintiff would have suffered had the tort been committed by a secular actor in a secular setting. Juries are frequently asked to exclude certain sources of injury—in this case religious sources—when calculating damages, and this procedure would allow plaintiffs' secular claims to go forward while protecting defendants' First Amendment rights. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES—GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 8.7 (2006) Personal Injury Damages—Exclusionary Instruction for Other Condition ("Do not include any amount for any condition *not resulting from* the occurrence in question") (emphasis original), & cmt. ("If it would add clarity in the individual case, an instruction not to consider specific, named . . . conditions would be proper, if requested."); *see also id.* at PJC 8.8 Personal Injury Damages—Exclusionary Instruction for Preexisting Condition That Is Aggravated, 8.9 Personal Injury Damages—Exclusionary Instruction for Failure to Mitigate. Further, if the case is tried without reference to religion, making an exclusionary instruction potentially confusing or prejudicial, the trial court could in these situations include a proximate cause question, which includes an element of foreseeability. *See id.* at PJC 2.4 Proximate Cause ("[T]he act or omission complained of must be such that a person using ordinary care

would have foreseen that the event, or some similar event, might reasonably result therefrom.") (emphasis omitted). Thus, the jury (not being aware of any religious aspect of the case) would find only damages reasonably connected to the secular assault.

Pleasant Glade, however, did not request any such instruction, and this omission bars relief.[12] *See* TEX. R. CIV. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."). Further, while the Court points to Dr. Helge's testimony as proof that Schubert's religious and secular damages are inextricably intertwined, another expert, Dr. Millie Astin, specifically stated that she *could* separate the two. And Schubert testified that while she was being restrained she was afraid she "was being injured" and that she "might die"—trauma clearly associated with the act of restraint itself. Although segregating the religious from the secular may sometimes be difficult, it can and should be done. *See Jones v. Wolf*, 443 U.S. 595, 604 (1979).

III

Because I would not dismiss for lack of jurisdiction, I would address Pleasant Glade's

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[12] Even under my view of judicial estoppel, Pleasant Glade would not be estopped from arguing that the jury improperly awarded mental anguish damages stemming from the religious implications of the incident, which I interpret to be consistent with the position it took in its mandamus petition.

argument that the trial court erred in allowing expert testimony on, and recovery for, Schubert's diagnosis of posttraumatic stress disorder. However, because the other evidence of Schubert's mental anguish, including "angry outbursts, weight loss, sleeplessness, nightmares, hallucinations, self-mutilation, fear of abandonment, and agoraphobia," 174 S.W.3d at 393, is sufficient to support the jury's award, I cannot say that the error, if any, "probably caused the rendition of an improper judgment." TEX. R. APP. P. 61.1(a); *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). It is therefore not necessary to consider Pleasant Glade's claims in any detail.

IV

Pleasant Glade also contends that the trial court erred in refusing to submit their *in loco parentis* defense to the jury, and that the First Amendment required a finding of actual malice to support the jury's award of mental anguish damages. In a cross petition for review, Schubert argues that the court of appeals erred in concluding there was no evidence to support a finding that Laura's loss of earning capacity was foreseeable and proximately caused by Pleasant Glade's conduct. I agree with the court of appeals' conclusions on these issues.

V

The Court today essentially bars all recovery for mental anguish damages stemming from allegedly religiously motivated, intentional invasions of bodily integrity committed against members of a religious group. This overly broad holding not only

conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice. Texas courts have been and will continue to be confronted with cases in which a congregant suffers physical or psychological injury as a result of violent or unlawful, but religiously sanctioned, acts. In these cases, the Court's holding today will force the lower courts to deny the plaintiff recovery of emotional damages if the defendant alleges that some portion thereof stemmed from the religious content of the experience—unless the trial court is able to anticipate that the case will fall under the Court's rather vague exception. *See* __ S.W.3d at __ ("[W]e can imagine circumstances under which an adherent might have a claim for compensable emotional damages as a consequence of religiously motivated conduct.").

I would affirm the court of appeals' judgment. Because the Court instead dismisses the case for lack of jurisdiction, I respectfully dissent.

Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 27, 2008

JUSTICE GREEN filed a dissenting opinion.

Because the fundamental principles of Texas common law do not conflict with the Free Exercise Clause, courts can and should decide cases like this according to neutral principles of tort law. *See Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876–90 (1990); *Jones v. Wolf*, 443 U.S. 595, 602–06 (1979). If a plaintiff's case can be made without relying on religious doctrine, the defendant must be required to respond in kind.[1] Though not always a simple task for courts, "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application." *Jones*, 443 U.S. at 604. In contrast, today's decision ignores the rule that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim," *Smith*, 494 U.S. at 887, replacing it with a far more dangerous practice: a judicial attempt to "balance against the importance of general laws the significance of religious practice," *id.* at 889 n.5. "The

---

[1] This case is not about sanctioning voluntary religious practices. If Schubert had consented to the church's actions, the consent—under our familiar, neutral principles of tort law—would have completely defeated her claims. *See* TEX. PENAL CODE § 22.01(a) (assault elements); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002) (false imprisonment elements); RESTATEMENT (SECOND) OF TORTS § 892A (1979) (effect of consent); *cf. Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) (consent as a matter of law). The jury, however, found that Schubert had not consented, and Pleasant Glade does not challenge that conclusion. When faced with an otherwise valid tort claim, Pleasant Glade's religious motivation is not a defense. *See Smith*, 494 U.S. at 876–90.

First Amendment's protection of religious liberty does not require this." *Id.* at 889. The trial court heeded these admonishments, but the Court today does not. For these reasons, and for those expressed by the Chief Justice, I respectfully dissent.

PAUL W. GREEN
JUSTICE

OPINION DELIVERED: June 27, 2008

JUSTICE JOHNSON, dissenting.

I dissent for the reasons stated below, as well as for the reasons stated by Chief Justice Jefferson in parts II-A, III, and IV of his dissent, which I join.

Pleasant Glade's[1] position on damages in its mandamus action and in this appeal is set out by the Court as follows:

> Pleasant Glade's mandamus petition, however, merely distinguished Laura's bodily injury claims from her emotional damage claims. That distinction is consistent with its present appellate contention that the award of damages for Laura's emotional injury is barred by the First Amendment. . . . Pleasant Glade argues on appeal that the First Amendment protects it from liability for Laura's emotional injuries connected with its religious practices . . . .
>
> . . . .
>
> . . . [W]e next consider whether the church's religious practice of "laying hands" is entitled to First Amendment protection. Pleasant Glade contends the First Amendment protects it against claims of intangible

[1] Laura's suit was against Pleasant Glade Assembly of God Church, its senior pastor, youth minister, and several individual members of the church. All the defendants will be referred to collectively as "Pleasant Glade" or "the church."

> harm derived from its religious practice of "laying hands."

___ S.W.3d at ___. In its brief on the merits, Pleasant Glade specifically disclaims seeking to avoid liability for bodily injuries to Laura:

> Petitioners have never claimed that the First Amendment somehow gives them immunity to commit intentional *bodily* injury. Instead, the First Amendment protections prevent religious beliefs and conduct from being put "on trial" to see if psychologists and the general public (the jury) agree with their practices. Tort liability certainly does not disappear. But, it must be limited.
>
> . . . .
>
> . . . If a church or pastor is sued for bodily injury, such as a car wreck or a broken arm, then the First Amendment does not apply.

In this regard, it is notable that Pleasant Glade does *not* make two claims in its appeal that bear on this case. First, the church's position is not that the "laying on of hands" doctrine encompasses forcefully and physically restraining persons and holding them down on the floor for extended periods of time against their will as the evidence here would have allowed the jury to believe was done. Although Senior Pastor McCutchen, in his affidavit, does not specifically disclaim extended physical restraint as

being part of the doctrine of "laying on of hands," he intimates as much:

> I certainly did not hold Laura Schubert down on the floor of the church, or ever hold her against her will. I did not instruct or direct any one else to do so. I did not see or hear any one else direct people to hold Laura Schubert against her will.

He does not assert in the affidavit that such courses of conduct *do* come within the doctrine. And second, Pleasant Glade does not urge on appeal that damages for physical injuries and pain Laura suffered because of the intentional acts to restrain her are precluded by the First Amendment.

The Court rightly says that freedom of belief may be absolute, but freedom of conduct is not. ___ S.W.3d ___. It then bypasses the difference between Laura's physical pain damages and her mental and emotional anguish by misreading the trial record as containing proof related solely to her subsequent emotional or psychological injuries. Laura testified that while she was going through the two episodes

> I was feeling pain. I was feeling–the only thing, I felt like somebody was going to break my leg. I felt like I could not breathe. . . . I had known that I had had the carpet burns and stuff, and I showed them to [my mother]. . . . [T]hey saw the bruises on my shoulders. . . . I lifted up the back of my shirt and showed her all the

carpet burns that were on the back of it.

The difficulty with the Court's conclusion and holding is pointed out by Chief Justice Jefferson: Laura claimed damages for physical injuries and pain as well as mental anguish; Pleasant Glade disclaims immunity from damages for physical injuries; there is legally sufficient evidence Laura suffered physical injuries, physical pain, and mental anguish; physical pain and mental anguish were submitted together in one damages subpart, and the jury found one damages amount; and the church does not challenge the legal sufficiency of the evidence as to physical pain.

Laura's testimony was evidence of, and raised the inference that, she suffered physically and endured both physical pain and mental anguish as a result of the restraints and her struggles against them. Her parents testified that she was bruised and scraped. Not only was there direct evidence of physical injury and pain from the restraints, but it was within the knowledge of the jurors, and the jurors were entitled to infer, that physical pain would accompany the extended forceful physical restraints that resulted in bruises and scrapes. The church did not object to the joint submission of physical pain and mental anguish damages with only one answer blank. Accordingly, the evidence is measured against the charge given. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (noting that when the charge is submitted without objection, the sufficiency of the evidence is measured against the charge given). I would hold that there is legally sufficient evidence to support damages for

physical injury and pain even if all evidence of Laura's subsequent and ongoing intangible psychological injuries were to be disregarded. Thus, the judgment for damages from physical pain and mental anguish should be upheld.

The Court says that intangible, psychological injury, without more, "cannot ordinarily serve as a basis for a tort claim against a church or its members for its religious practices." ___ S.W.3d at ___. I agree. But rather than preclude recovery for physical injuries and pain such as are involved in this case in which there are also claims for subsequently-occurring emotional injuries that relate to both the physical restraint and religious practices, I would preclude damages for those emotional injuries for which there is any evidence of causation by religious beliefs or teachings. This would prevent the "entanglement" with First Amendment issues with which the Court is properly concerned. I would not make that preclusion an affirmative defense as Chief Justice Jefferson advocates because it is hard to see how such an affirmative defense would work in a practical sense. It would require presenting evidence of and, at least to some degree, evaluating the religious beliefs involved. And religious beliefs in many, if not most, instances are not just beliefs—they are among individuals' most deeply-held convictions. Asking jurors to separate themselves from convictions as to their own or another's religious beliefs and to dispassionately evaluate damages related to those beliefs, in my view, asks too much of them.

I would hold that whether alleged mental and emotional damages resulted to any degree from

religious beliefs and teachings should be determined by the trial court as a matter of law. Evidence of religious practices and beliefs should be precluded by means of pretrial hearings or motions in limine, as was done for the most part in this case. If the question could not be decided until after all the evidence was presented, the trial court could either direct a verdict as to damages other than those from physical injury and pain or submit separate questions as to each element of damages so the First Amendment issue as to emotional or psychological damages could be properly isolated. The trial court could then consider granting judgment notwithstanding the verdict as to emotional damages. Limiting evidence and submitting a separate damage question for physical injuries and pain protects all interests involved: the individual claiming damages, the church, and members of the church.

I would affirm the judgment of the court of appeals.

Phil Johnson
Justice

OPINION DELIVERED: June 27, 2008

APPENDIX B

NO. 141-173273-98

IN THE DISTRICT COURT
141ST JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

LAURA SCHUBERT, TOM SCHUBERT
AND JUDY SCHUBERT

VS.

PLEASANT GLADE ASSEMBLY OF
GOD, ET AL.

COURT'S CHARGE TO THE JURY

MEMBERS OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath, and such exhibits, if any, as have been introduced for your consideration under the rulings of the court. In other words, consider only what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win and then try to answer the questions accordingly. Simply answer the questions and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the

answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

An important part of your function is to weigh and evaluate the evidence and testimony of each witness and document admitted into evidence by the Judge. In exercising this function, the jury may and should consider the conduct and demeanor of the witnesses, their bias, interest, prejudice, or lack of such qualities, and may and should determine the witness' credibility under the

facts and circumstances of the case. You may accept part of a witness' testimony and reject part of it; you may accept all of it or reject all of it, and you may accept all of one witness' testimony and reject the testimony of another witness, although you must not do this arbitrarily.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term *PREPONDERANCE OF THE EVIDENCE* means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence, except that a finding of "None" to a question inquiring of damages may be based upon a failure of the evidence to demonstrate an answer by a preponderance of the evidence.

DEFINITIONS AND INSTRUCTIONS

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

JURY QUESTIONS

Question No. 1.

Did any of the following Defendants falsely imprison Laura Schubert?

"Falsely imprison" means to willfully detain another without legal justification, against her consent, whether such detention be effected by violence, by threat, or by any other means that restrains a person from moving from one place to another.

Answer "Yes" or "No" as to each Defendant:

Reverend Lloyd A. McCutchen	Yes
Rod Linzay	Yes
Holly Linzay	Yes
Becky Bickel	Yes
Rigina Beberwyck-Martin	No
Ileana Randolph	No
Paul Patterson	Yes
Denise Patterson	No
Sandra Smith	Yes

QUESTION NO. 2.

Did any of the Defendants commit an assault against Laura Schubert?

A person commits an assault if he (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative.

Answer "Yes" or "No" as to each of the Defendants:

Reverend Lloyd A. McCutchen	Yes
Rod Linzay	Yes
Holly Linzay	Yes
Becky Bickel	Yes
Rigina Beberwyck-Martin	No
Ileana Randolph	No
Paul Patterson	Yes
Denise Patterson	No
Sandra Smith	Yes

If you have answered "Yes" to more than one of the Defendants in Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 3.

What percentage of responsibility do you find to be attributable to each of those found by you, in your answers to Question No. 1 or Question No. 2, to have been responsible?

The percentages you find must total 100 percent, and must be stated in whole numbers.

Reverend Lloyd A. McCutchen	50%
Rod Linzay	25
Holly Linzay	3
Becky Bickel	15
Rigina Beberwyck-Martin	0
Ileana Randolph	0
Paul Patterson	4
Denise Patterson	0
Sandra Smith	3
TOTAL	100%

If you have answered "Yes" to any part of Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 4.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Laura Schubert for her injuries, if any, resulting from the occurrences in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you may find.

Answer separately in dollars and cents for damages, if any:

a. Physical pain and mental anguish sustained in the past.

$ 150,000.00

b. Physical pain and mental anguish that, in reasonable probability, Laura Schubert will sustain in the future.

$ 0.00

c. Loss of earning capacity sustained in the past.

$ 10,000.00

d. Loss of earning capacity that, in reasonable probability, Laura Schubert will sustain in the future.

$ 112,000.00

e. Medical care in the past after Laura Schubert turned eighteen.

$ 12,000.00

f. Medical care that, in reasonable probability, Laura Schubert will sustain in the future.

$ 16,000.00

If you have answered "Yes" to any part of Question No. 1 or Question No. 2, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 5.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Tom Schubert and Judy Schubert for Laura Schubert's medical expenses incurred, if any, while she was a minor, as a result of her injuries, if any?

Answer in dollars and cents:

$ 0.00

After you retire to the jury room, you will select your own Presiding Juror. The first thing the Presiding Juror will do is have this entire charge read aloud, and then you will deliberate upon your answers to the questions asked.

It is the duty of the Presiding Juror:

1. To preside during your deliberations;

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;

3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge;

4. To vote on the questions;

5. To write your answers to the questions in the space provided; and

6. To certify to your verdict in the space provided for the Presiding Juror's signature, or to obtain the signatures of all of the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case

before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the court of this fact.

When you have answered all the questions you are required to answer under the instructions of the Judge, and the Presiding Juror has placed your answers in the spaces provided and signed the verdict as Presiding Juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will be returned into court with your verdict.

/s/ Paul Enlow

JUDGE PRESIDING

CERTIFICATE

We, the Jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the Presiding Juror if unanimous)

/s/

Presiding Juror

(To be signed by those voting for the verdict if not unanimous)

APPENDIX C

THE SUPREME COURT OF TEXAS

Orders Pronounced August 29, 2008

ORDERS ON CAUSES

* * * *

THE MOTIONS FOR REHEARING OF THE FOLLOWING CAUSES ARE DENIED:

* * * *

05-0916 PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON v. LAURA SCHUBERT; from Tarrant County; 2nd district (02-02-00264-CV, 174 SW3d 388, 09-15-05)

APPENDIX D

NO. ____ _____

IN THE
SUPREME COURT OF TEXAS
Austin, Texas

PLEASANT GLADE ASSEMBLY OF GOD,
Petitioner/Defendant,

VS.

LAURA SCHUBERT,
Respondent/Plaintiff.

On Petition For Review From The
Second Court of Appeals At Fort Worth, Texas
Case No. 02-02-00264-CV

PETITION FOR REVIEW

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Whether the Court of Appeals erred in allowing recovery of damages for Post Traumatic Stress Disorder based upon adults restraining a teenage child when there was no jury finding and no evidence that such damages were *foreseeable*, and there was no malice nor other bad motive. 7

ISSUE NO 2:

Whether the Court of Appeals erred in finding that the expert psychological testimony

regarding Post Traumatic Stress Disorder met the requirements for scientific reliability, as required by the Texas Rules of Evidence and this Court's holdings in the *Havner* and *Robinson* cases regarding expert testimony. 7

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IN THE
SUPREME COURT OF TEXAS
Austin, Texas

PLEASANT GLADE ASSEMBLY OF GOD,
Petitioner/Defendant,

VS.

LAURA SCHUBERT,
Respondent/Plaintiff.

On Petition For Review From The
Second Court of Appeals At Fort Worth, Texas
Case No. 02-02-00264-CV

BRIEF ON THE MERITS OF PETITIONER PLEASANT GLADE ASSEMBLY OF GOD

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NO. 05-0916

IN THE
SUPREME COURT OF TEXAS
Austin, Texas

REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL and PAUL PATTERSON
Petitioners/Defendants,

VS.

LAURA SCHUBERT,
Respondent/Plaintiff.

On Petition For Review From The Second Court of Appeals At Fort Worth, Texas
Case No. 02-02-00264-CV

REPLY BRIEF (COMBINED) OF PETITIONERS REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, PAUL PATTERSON AND PLEASANT GLADE ASSEMBLY OF GOD TO RESPONSE OF LAURA SCHUBERT

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No. 08-592

Supreme Court, U.S.
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In The

Supreme Court of the United States

LAURA SCHUBERT,

Petitioner,

v.

PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. McCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL and PAUL PATTERSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

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QUESTIONS PRESENTED

I. Should this Court decide whether Texas courts will assert jurisdiction over a Texas personal injury case?

II. Should this Court re-set the parameters of Texas personal injury law, so that a recovery of mental anguish damages can be made from a church consistent with the Free Exercise Clause?

III. Does the Free Exercise Clause limit the recovery of personal injury damages from a church for emotional injuries to one of its members?

IV. Did Petitioner waive her complaints (about constitutional limitations on her recovery of damages for emotional injuries) by not appealing from the original *In re Pleasant Glade* decision in 1998?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Pleasant Glade Assembly of God (the "Church") was a Non-Profit Corporation incorporated under Texas law. It had no parents or subsidiaries, nor any public company that owned 10% or more of its stock. The Church is currently defunct.

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JURISDICTION

The question presented by Petitioner is a mixture of state personal injury law and constitutional law. This Court has jurisdiction under 28 U.S.C. § 1257(a), but such jurisdiction only extends to a *small portion* of the question presented by Petitioner Laura Schubert. Petitioner originally brought state law personal injury claims as a tort plaintiff. The Free Exercise Clause (the only federal question) was raised by Defendants/Respondents as an *affirmative defense.* The Church and other Respondents successfully invoked the Free Exercise Clauses in both the U.S. Constitution and the Texas Constitution, Art. 1, § 6.

This Court has jurisdiction over the Respondents' *affirmative defense* under the United States Constitution, because such a defense is a "right, privilege or immunity" under the Constitution. 28 U.S.C. § 1257(a). But, this Court lacks jurisdiction to describe the parameters of the right which Petitioner ultimately seeks to vindicate: the right to have a Texas court assert jurisdiction over a personal injury case to recover mental anguish damages under Texas law. *Murdock v. City of Memphis,* 87 U.S. 590, 626 (1875) (this Court's jurisdiction is only over federal questions). Also, this Court lacks jurisdiction to decide other unresolved state law barriers to Petitioner's personal injury recovery: the unique Free Exercise Clause under the Texas Constitution, the common law constraints against awards for mental anguish (when there is no malice nor foreseeability of injury), the *in loco parentis* defense, and the lack of

reliable psychological evidence on causation. This Court usually reserves its jurisdiction to decide clearly presented Constitutional questions that will control the final outcome of a case. The most this Court could do is to reverse and remand the case and order that Petitioner's claims be adjudicated by Texas courts under Texas personal injury law, if the Texas Constitution's Free Exercise Clause permits. Thus, this case could be "a classic example of a case where 'the same judgment would be rendered by the state court after we corrected its views of federal laws,'" *Richardson v. Ramirez,* 418 U.S. 24, 60 (1974), quoting, *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

TEXAS CONSTITUTION

Article 1 - Bill of Rights
Section 6 – Freedom of Worship

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority ought,

in any case whatever, to control or interfere with the rights of conscience in matters of religion. . . .

INTRODUCTION

Petitioner Laura Schubert and her family were once members of a Pentecostal church, Pleasant Glade Assembly of God. Petitioner brought state law personal injury claims against the Church, its Pastors, and members. The suit complained of emotional injuries from "spiritual warfare" activities that arose during church services. This spiritual warfare included the practice of "laying on of hands" and prayers that Laura be delivered from evil spirits (*i.e.*, protected from demons). During these prayers, Laura was thrashing and complaining about demons attacking her. At times, she was physically restrained during the prayers. Ultimately, "I said the name *Jesus* and they let me up."

At first, Laura's family brought an informal religious complaint within the Church, citing biblical scriptures to support their position that the religious conduct was inappropriate. These complaints alleged that Laura was a victim of "friendly fire" in "spiritual warfare." When the ecclesiastical complaints failed to bring any relief, Petitioner filed this civil suit and sought damages to compensate her for an emotional injury, Post Traumatic Stress Disorder. She alleged that her PTSD was brought on by the "Hyper-spiritualistic environment" at her church. Her

injuries included her "loss of faith." Her PTSD is triggered by "anything religious," such as spiritual hymns or biblical scriptures.

The Texas Supreme Court correctly concluded that her claims were similar to claims for *intentional infliction of emotional distress*, a controversial common law tort. Under state law, the conduct of the defendant is not emotionally tortious, unless the conduct is "extreme and outrageous" in the context of surrounding circumstances. But, applying such a test for outrageousness would require passing upon the merits of the Church's practices about "spiritual warfare." And, tort claims to recover mental anguish would require deciding upon the culpability of the defendant's intentions, *i.e.* whether the church members were guilty of acting with malice. If not, then mental anguish damages are not recoverable.

The Texas Supreme Court held below that such judicial inquiries were beyond the *jurisdiction* of the Texas courts. Texas courts were constrained by the First Amendment of the United States Constitution, and a unique Free Exercise provision in the Texas state constitution. Pursuing this tort path would take the courts into forbidden territory: protected religious conduct.

Petitioner now seeks to advance a state law claim by having this Court force the Texas courts to exercise jurisdiction over her personal injury claim. Presumably, this Court would then order the weighing of the Church's conduct under Texas law. To grant

certiorari, this Court would have to conclude that it is in a superior position to map the contours of Texas personal injury law, and thereby determine that such law is actually "neutral" concerning religion, under the standard of *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). And, granting certiorari would, itself, be a rejection of the Ecclesiastical Autonomy Doctrine.

This Court should not compel a Texas state court to exercise jurisdiction over a Texas personal injury claim. Tort law about mental injuries is neither objective nor neutral. Objective rules of law cannot be applied to judge a Pentecostal church's response to Petitioner's urgent complaints that she was being attacked by demons during church services.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This is a fact-intensive case that led to unique state law claims about psychological injuries (Post Traumatic Stress Disorder) following "spiritual warfare" when Petitioner Laura Schubert complained that she was being attacked by demons during church services. There has never been a similar claim in United States courts.[1]

[1] Virtually all suits against churches and other religious institutions that may invade their Free Exercise rights are

(Continued on following page)

A. Spiritual Warfare – A Controversial Tenet Of The Pentecostal Church

The Church was sued and found liable due to "spiritual warfare" activities in its Church services. A counselor who treated Laura Schubert rendered the opinion that the "hyper-spiritualistic atmosphere" in the Church caused Laura's emotional problems. (RR 8, p. 3-5) Laura's father, a missionary within the Pentecostal church, complained that Laura was a victim of "friendly fire" from spiritual warfare. (App. 6)

The Church, Pleasant Glade Assembly of God, was[2] a church within the Assemblies of God (AG) denomination.[3] The Assemblies of God is a mainline Christian denomination that was formed in 1914. Its members are referred to as "Pentecostals" because of a biblical incident of the same name.[4] The name "Pentecostal" is taken from the biblical description of

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compiled in one annotation: Alan Stephens, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. Fed. 754, 774-77 (1989).

[2] The Church entity is now defunct, having merged its congregation into another Assembly of God church during the ten years of this litigation.

[3] For ease of Briefing, Respondents will employ the term "the Church" collectively to refer to both the Church entity, and the individual Pastors and Members who belonged to the Church.

[4] *The New International Dictionary of Pentecostal and Charismatic Movements*, p. 333-335 (Zondervan Publishing 2002).

an unusual event in which early Christians were energized when the Holy Spirit descended upon them and they began to "speak in other tongues." They enthusiastically spread through a nearby crowd speaking in tongues and working miracles. (New International Bible, Book of Acts 2: 1-21).

Pentecostal services often include vigorous physical activities. Upon being "filled with the Holy Spirit" during their services, Pentecostals may enthusiastically engage in divine healing, prophecies, speaking in unknown tongues (glossolalia), and sometimes the "binding" or "casting out" of demons.[5] Depending upon the movement of the spirit, all of this may occur at the same time. Some church members fall unconscious to the floor because they have been "slain in the spirit."[6] As at the original biblical Pentecost, to outsiders Pentecostals may appear to be drunken.[7]

"Spiritual warfare" against demons is a uniquely Pentecostal practice. Pentecostals are not unique because they believe in the *existence* of demons.

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[5] These various Pentecostal experiences, "laying on of hands", exorcism, and speaking in other tongues (glossolalia) are explained in detail in *The New International Dictionary of Pentecostal and Charismatic Movements*, p. 624-627, 670-672, 834-836 (Zondervan Publishing 2002).

[6] *Id.* at 1072-1074 ("Slain In The Spirit").

[7] The bible indicates that, at the original Pentecost, outside observers concluded that the disciples had consumed too much wine. Book of Acts 2: 13, 15.

Virtually every major world religion believes that demons exist.[8]

What makes Pentecostals controversial is that they believe in engaging in active "spiritual warfare" against demons.[9] Stanley M. Burgess, ed. *Encyclopedia of Pentecostal and Charismatic Christianity*, p. 123 (Berkshire Publishing 2006) This warfare against demons is one of the unique attributes of Pentecostals.

> Church growth proponents have noted seriously dealing with demonic opposition has been one of the distinctive marks of Pentecostal growth . . .
>
> Pentecostals accept the fact that most men and women today believe that demons and evil spirits (varying forms of Satan and dark thoughts) do invade them, bind them, and

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[8] *The Oxford Dictionary of World Religions*, p. 268 (Oxford Press 1997) explains the world-wide belief in demons:

> Demonic figures appear in all religions. Examples are: in Judaism, dibbuks, golems; in Christianity, fallen angels; in Islam, shaitans; in Hinduism, asuras, raksasas; in Buddhism, asuras, yakkhas, mara; in China, kuei. These personified descriptions of the forces of evil are clearly evoked by the universal human experience of encountering evil, not as an abstraction, but as more like the consequence of personal agency.

[9] "Since the Gospels are replete with the accounts of the power of Jesus over demons, pentecostals have seen the ministry of Jesus as the biblical paradigm for the practice of exorcism." *The New International Dictionary of Pentecostal and Charismatic Movements*, p. 624 (Zondervan Publishing 2002).

> rule over them. Pentecostals believe that the mighty name of Jesus drives out evil spirits and heals all manner of sickness.

The New International Dictionary of Pentecostal and Charismatic Movements, p. 627 (Zondervan Publishing 2002). This spiritual warfare includes *Exorcism* for people who are inwardly "possessed" by demons, and *Deliverance* for people who are outwardly oppressed by demons. The differences between the two are subtle.[10]

Tens of millions of Pentecostal followers pursue these beliefs without any visible sign of emotional distress. For example, Sarah Palin has been a member of the Assemblies of God denomination since her youth.[11] Like the Church here, Sarah Palin has been derided for her beliefs in "spiritual warfare." Persons with actual video of her being spiritually protected from the powers of "witchcraft" posted the videos on YouTube. They generally derided Pentecostal concerns that witchcraft was a serious concern in Wasilla, Alaska. To outsiders, Pentecostal practices are sometimes weird.

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[10] Stanley M. Burgess, ed. *Encyclopedia of Pentecostal and Charismatic Christianity,* p. 123 (Berkshire Publishing 2006) (exploring technical distinctions between Exorcism of persons who are possessed, and Deliverance for persons who are oppressed). See also *The New International Dictionary Of Pentecostal And Charismatic Movements* (Exorcism: Classification and Terminology) p. 626 (Zondervan Publishing 2002).

[11] She was a member of the Wasilla Assemblies of God.

B. The Schubert Family – Once Advocates Of The Pentecostal Message

The entire Schubert family grew up advocating this "spiritual warfare" theology. The father, Tom Schubert, was a missionary proclaiming this faith in Africa. The entire Schubert family was involved in this missionary effort. As a child, Laura Schubert attended hundreds of such Pentecostal church services, sometimes as an active participant to advance her family's missionary efforts. (RR 8, p. 113) And, she was an active participant in the Pleasant Glade Assembly of God, a Respondent here. In the week prior to the incidents in this case, Laura had spent more than *60 hours* at the Church. There was no evidence that she was coerced or forced to attend. This was simply normal church life for her and her family. (RR 4, p. 67)

C. Laura Was Left In The Care Of The Pentecostal Church

The weekend of June 8th – June 9th, 1996 was the first time that parents Tom and Judy Schubert left their three teenage children alone. The parents flew to Indiana for the weekend, knowing that teenager Laura Schubert would usually be at their Pentecostal church in Colleyville, Texas. (RR 5, p. 195-196, 198) They left with the expectation that the church members would exercise parental supervision (*in loco parentis*) over their children. (RR 8, p. 135-137)

On Friday, June 7th, Laura spent the entire night of Friday night at the Church. The youth had a "lock in." (RR 4, p. 68-69) Youth Pastor Rod Linzay and various members of the Church engaged in many religious activities relating to "spiritual warfare." This started when one of the members of the youth group claimed to have seen a demon in the Church. Rod Linzay talked to the youth extensively about demons and led them in vigorous "spiritual warfare" against the demons. Typical of Pentecostal practices, the spiritual warfare against the demons included vigorous activities. This warfare ended sometime Saturday morning with the Youth Pastor sharing a vision from God about defeating the demons.[12]

The next day Laura worked extensively and did not sleep for a second night. She entered Sunday having been largely deprived of sleep for two days and having eaten almost nothing during this week-end. (RR 4, p. 68-69)

On Sunday *morning*, June 9th, Laura stood up in front of the Church and gave a moving testimonial to the congregation to announce her calling to become a missionary overseas. She would follow in her father's footsteps and become a missionary for the Pentecostal church. (RR 5, p. 75-76)

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[12] See App. 3.

At the end of this service, Laura' younger brother, Joey, went up to the front of the Church and collapsed. Joey has a long history of emotional/mental problems variously described as agoraphobia or adjustment disorders. (RR 6, p. 26, 28; RR 5, p. 117) Joey's behavior was unusual. He foamed at the mouth and trembled while various members of the Church, including Laura, placed their hands upon him and prayed over him for hours. (CR 9, p. 1513-1514; RR 5, p. 80-82; RR 14, p. 259-260) Joey would later testify that he had been restrained against his will by the church members, including his sister Laura. (RR 15, p. 220-221) But, he did not assert any legal claims.

D. Sunday Night Service – Laura Collapses To The Floor

By the end of the Sunday evening service, Laura was "dog-tired." (RR 4, p. 11) At the close of the Sunday evening service, while virtually everyone was still present, Laura went up to the front of the Church near the altar. She said something to a friend about feeling ill, and then fainted down to the floor. (RR 5, p. 80) *This was the first time that attention had focused on Laura*. Laura explained what she did that attracted the attention of the Church:

> Q: When you were in this condition on the floor of the church, did you make statements about Satan trying to get you, or demons trying to get?
>
> A: [Laura] I believe I was hallucinating.

Q: **Did you make statements along the lines of Satan's trying to get me or he's trying to get us all? Did you make those statements during this collapse experience?**

A: [Laura] **Yes, I believe I did.**

(RR 8, p. 180-181) (CR 9, p. 1521) (emphasis added).

Laura was writhing on the floor, hallucinating about demons, clenching her fists tightly, foaming at the mouth, making guttural noises, and sweating profusely. (RR 9, p. 148, 266; RR 15, p. 73) How should a Pentecostal react? They believe in spiritual diagnosis by "discernment," by looking at "various signs of demonization . . . strange behavior or moodiness, and sudden changes of voice or emotions."[13] The difficulty of this process of "discernment" is explained in Pastor McCutchen's Affidavit, App. 9-10.

Of course, outsiders would later disagree that this was a spiritual experience. One of Laura's medical doctors, Dr. Pentzien, later testified at trial that Laura had collapsed due to a medical condition: hypoglycemia. (RR 13, p. 244) Hypoglycemia is a deficiency of sugar (glucose) in the blood. The symptoms include acute fatigue, restlessness, malaise, marked irritability, weakness, mental disturbances,

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[13] *The New International Dictionary of Pentecostal and Charismatic Movements* (Exorcism, Methodology and Practices) p. 626 (Zondervan Publishing 2002).

and delirium.[14] Pentzien testified that Laura's experience was a "classic" set of symptoms of hypoglycemia, complete with the clenched fists, thrashing behavior and guttural sounds. (RR 15, p. 73)[15]

All the witnesses agreed about the general sequence of events. All witnesses agreed that everyone who came over to Laura, did so in an effort to assist her. (RR 12, p. 102-103, 177) There is no evidence that anyone approached Laura with any desire to hurt her (RR 15, p. 152; RR 12, p. 102, 141) or because they had any feelings of ill will or malice toward her.

At times church members grabbed her arms and hands and restrained her against her will. (RR 5, p. 140, 163) Later, she was "walked around" the sanctuary with her arms draped over the necks of several church members. (RR 8, p. 155-156; RR 12, p. 7, 11, 41, 176-177, 224; RR 13, p. 80)

The church members became concerned that Laura was gathering a crowd of admirers by summoning the youth group to tell them about a "vision"

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[14] See Pentzien at RR 13, p. 245-246; RR 15, p. 73; *Taber's Cyclopedic Medical Dictionary* (17th ed. 1993) p. 947.

[15] There was much dispute on whether Laura was thrashing because the church members were restraining her, or they were restraining her because she was thrashing. However, no one testified that restraining her somehow was the cause of her hallucinating about demons attacking her. Depending on one's beliefs, this was caused by: (1) fatigue and hypoglycemia; (2) psychological problems; or (3) demons attacking her.

she had while on the floor of the Church. (RR 9, p. 271; RR 13, p. 197-199, 205-206) At some point Laura was taken back to a Sunday School room. (RR 12, p. 60, 69) Laura testified that this was done, not out of any desire to confine her, but because the adults "wanted me to be away from the kids, because they felt like the kids were upsetting me." (RR 4, p. 74)

According to Laura, she was held in the room by the use of vigorous force, despite her demands that people get away from her. (RR 4, p. 73-74, 75) She testified that she was allowed to get up only when she finally "did what they asked." (RR 4, p. 77) "Eventually, yes. I complied with what they wanted me to do. I said the name *Jesus* and they let me up." (RR 4, p. 73-74; CR 9, p. 1522)

Why was the utterance of the name of *Jesus* so important? Under Pentecostal beliefs, demonic control over a person causes them to have an "irrational and violent reaction against the name of Jesus." But, confessing the name of *Jesus* is protection against demonic possession or oppression.[16] As one Pentecostal authority explains, "The primary method of deliverance is the name of *Jesus*, used with a sense of authority to abjure the demon to release the person." Stanley M. Burgess, ed. *Encyclopedia of Pentecostal*

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[16] *The New International Dictionary of Pentecostal and Charismatic Movements* (Exorcism, Methodology and Practices) p. 625 (Zondervan Publishing 2002).

and Charismatic Christianity p. 125 (Berkshire Publishing 2006).

The next events were undisputed. The youth group, including Laura, proceeded to McDonald's where they ate supper, and then to a church member's house to watch a movie. (RR 12, p. 182; RR 13, p. 211) On Monday, Tuesday, and Wednesday, Laura returned to the Church for extended periods of time. Nothing eventful occurred, until the Wednesday night Youth Service. (RR 4, p. 81)

E. Wednesday Night Service – Laura Curls Up Into A Fetal Position

The Wednesday Youth Service was held in a separate building, apart from the main sanctuary. Again, Laura's parents were not at the Church, though they were back in town.

The Youth Pastor was in charge of the service. According to Laura, at the end of the service she curled up into a fetal position, because she wanted to be left alone. (RR 4, p. 82) According to several witnesses, Laura *yelled* something like "no" or "get away." (RR 4, p. 82-83) This was interpreted in different ways. To Laura, she was speaking to persons around her, telling them to leave her alone. To the church members, she was not speaking to anyone physically present. They believed Laura was having another episode like the previous Sunday night when she had been fending off unseen spiritual attackers. (RR 14, p. 129, 168; RR 15, p. 153)

According to Laura, the youth, under the direction of the Youth Pastor, then told the youth members to hold Laura down. (RR 4, p. 209; RR 5, p. 162) She testified that she was held in a "spread eagle" position with numerous youths holding down her arms and legs. (RR 4, p. 85) While this might seem strange to an outsider, Pentecostals believe that persons afflicted with demons are possessed with remarkable strength.[17] In one biblical example that continues to be cited in Pentecostal literature, a demon attacked the persons attempting exorcism, "so that they fled out of that house naked and wounded." (Acts 19: 11-17)

Adults were summoned from the main sanctuary to help Laura. At some point, the Senior Pastor, Lloyd McCutchen, was summoned from the main service to the youth room. (RR 12, p. 94-95)[18] Thus, this was his first and only direct encounter with Laura. (RR 12, p. 92-94) He came over to the youth building, put his hand upon her forehead and prayed the name of

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[17] "Astounding strength" is one of the characteristics of a demonic presence, Stanley M. Burgess, ed. *Encyclopedia of Pentecostal and Charismatic Christianity*, p. 123 (Berkshire Publishing 2006), in accordance with biblical accounts of demonic persons being "exceedingly fierce" (Matthew 8: 28), breaking chains (Mark 5: 3-5), and attacking persons who resist them (Acts 19: 11-17).

[18] He had not been present for the Sunday evening episode, having departed from the Church with a guest singer prior to the time that Laura collapsed to the floor of the Church. (RR 12, p. 90-91)

Jesus. (RR 12, p. 97, 146; RR 14 p. 66; Petition, Appendix 5a) There was no evidence that he "assaulted" her, nor that he "imprisoned" her. But, the jury found both, and he was assessed the largest share of fault: 50% of the comparative responsibility.

Someone suggested that they call Laura's parents, and Pastor McCutchen agreed. (RR 11, p. 12; RR 12, p. 132-133) Tom and Judy Schubert drove up to the Church. (RR 8, p. 44) They then entered the Church and, for the first time, actually entered these events. Tom described finding Laura in an exhausted position. (RR 8, p. 45) But, she did not require any medical attention. (RR 8, p. 47; RR 4, p. 90; RR 12, p. 100) Instead, they went to Bennigan's for a meal and then went home. (RR 4, p. 87; RR 8, p. 46) Laura received no medical treatment for any bodily injuries from these incidents. Her injuries were psychological.

In the days that followed, Laura resumed her activities at the Church. (RR 5 p. 130-133) But, Laura began to have sleepless nights and anxieties about demons. (Tom Schubert's letter, App. 5) Depending on one's beliefs these anxieties were either psychological symptoms or actual demons. At the time, Laura believed they were real. She ultimately brought suit to recover damages for this mental anguish.

F. The First Psychological Care – Hyper-Spiritualistic Environment

Laura's first visit with any type of psychologist or counselor was on June 27, 1996. The psychological notes include events about her traumatic childhood in Africa, but then include the opinion that the *hyper-spiritual environment* at the Church was the cause of her current anxieties. (RR 4, p. 157) "Hyper" is the psychological and medical term for an *excess*.[19] This psychological diagnosis was admitted into evidence in the jury trial below, despite Respondent's First Amendment objections. (RR 8, p. 5-6)

During the years that followed, Laura saw many different counselors and was sometimes admitted to psychiatric institutions for several days. (RR 4, p. 102, 104) Her psychological records contain widely varying symptoms and traumas. Some counselors diagnosed Laura with other conditions (such as Borderline Personality Disorder), and other causes, such as a traumatic and violent childhood in Africa. But, at trial she introduced the records, indicating that she had PTSD as a result of activities at the Church.

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[19] In medical and psychological terminology, the term "hyper" is a prefix meaning "above, excessive, or beyond." Clayton L. Thomas, ed., *Taber's Cyclopedic Medical Dictionary*, p. 930 (17th ed. 1993). For example, hyper-activity is "excessive activity." *Id.*

G. This Case Began And Ended As A Religious Dispute

After the events at the Church, Tom Schubert, then a Pastor and Missionary for the Assembly of God denomination, wrote letters complaining to Senior Pastor McCutchen about the entire weekend. His complaints were entirely religious, quoting doctrines and scriptures. He did not complain of any restraint or assault. His description is filled with battleground metaphors:

> What those kids went through during a night of spiritual battle was just as hurtful as what Laura faced in Africa. Laura knows that Demons are bigger and more dangerous than Cameroonian soldiers with machine guns. Pray for her. She went through a war and is now a casualty, feeling abandoned by her own troops at the front lines as an injured soldier. She deserves a purple heart because she fought a good fight, though she took a hit from *friendly fire*.
>
> We are believing that in time she will be able to be trained to go back to the front lines of the battle and to fulfill the ministry call that she received at the altars of Pleasant Glade.

Tom Schubert's letter of August 2, 1996, App. 6, emphasis added. He ended his letter by entusting this matter to church authorities, saying, "We will leave it to you to investigate if you feel it is necessary . . . I am placing this situation in your hands and hope God gives you wisdom." The Senior Pastor responded

explaining why he believed the activities at the Church were entirely consistent with scripture and the teachings of the Church.

Not receiving satisfaction at this level, Tom Schubert then appealed to the denomination's District Superintendent, Derwood Dubose, who holds the ecclesiastical office that is equivalent to a Bishop. Tom Schubert again demanded that disciplinary action be taken against the Church, because their religious practices were spiritually incorrect. *Id.* at p. 117-124. Not receiving ecclesiastical satisfaction, he then filed this lawsuit in court.

II. PROCEEDINGS BELOW

The Original Complaint was filled with allegations about the Church's religious statements about demons, God, the use of a cross, prayers, exorcism, etc. (CR 1, p. 4-16) In response to the original dismissal motion, Tom Schubert authored his own Affidavit complaining that the conduct at the Church was, according to him, out of line with the beliefs and practices of the Assembly of God denomination. (See p. 161-166 to Appendix to Petition for Writ of Mandamus proceeding.) The basis of his complaint was that, while prayers about demons might be appropriate for *non-believers*, Laura was a *saved Christian*. Therefore, these prayers and practices were inappropriate *for her*,

due to her spiritual status. Pentecostal Theology is not so simple.[20]

The Original Complaint alleged that this religious conduct traumatized Laura Schubert and emotionally injured her by causing PTSD. (CR 1, p. 16-17) While the Original Petition also complained of physical restraint, the resulting injury from this physical conduct was alleged to be only some bruises and scratches.

Respondents filed a petition for mandamus (an interlocutory appeal) in the Texas appellate courts. The Court of Appeals agreed that large portions of the original case had to be dismissed, because the complaints violated the First Amendment guarantee of Free Exercise of religion. This dismissal in 1998 included *all* of Petitioner's claims that emotional distress had been inflicted upon her by the Church, either intentionally or negligently:

> Regarding negligent and intentional infliction of emotional distress, the First Amendment gives Pleasant Glade the right to

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[20] Tom Schubert argued that, since Laura was a Christian, she could not have been possessed by a demon. Some Pentecostal authorities respond with the reverse logic, "a major moral lapse or a series of smaller lapses allow one [a Christian] to fall under the power of the enemy. 'Possession' signals that the (former) believer is no longer a child of God." Stanley M. Burgess, ed. *Encyclopedia of Pentecostal and Charismatic Christianity* (Demonization and the Christian) p. 124 (Berkshire Publishing 2006). Thus, the fact that she was afflicted by demons may have been evidence of a fallen spiritual condition.

> engage in driving out demons – intangible or emotional harm cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for religious practices.

In re Pleasant Glade Assembly of God, 991 S.W.2d 85, 89 (Tex. App. – Fort Worth 1998, orig. proceeding), hereafter cited as the *Pleasant Glade I* decision.

Petitioner did not appeal nor seek further appellate review from this *Pleasant Glade I* decision. Instead, she appeared to go forward with a claim for *bodily injury* from false imprisonment and assault, on allegations that the Church and its members acted with *malice* and intended bodily harm.[21] While pretending to advance a bodily injury claim, Petitioner ultimately sought to circumvent the original Court of Appeals holding that she could not assert claims that emotional and intangible harms had been caused by religious conduct. Thus, during the trial (that was supposedly about bodily injury), she introduced her counseling records that the "Hyper-spiritualistic environment" during church services caused her emotional injuries.

During the trial, Laura's PTSD was directly linked to religion and the activities in the Church services. For example, one witness told about taking

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[21] In personal injury parlance, the term "personal injury" includes both "bodily injury" and "mental anguish." "Bodily injury" is a narrower category and does not include mental anguish. Black's Law Dictionary, p. 789-790, "Injury" (7th ed. 1999).

Laura on his family vacation. She showed no psychological problems until she attended a Pentecostal church service. She began to hear voices again, which she refers to as "auditory hallucinations." This testimony was offered for the sole purpose of showing that going to a Pentecostal church service triggered her PTSD. (RR 11, p. 22)

There was no proof that the Church Members or Pastors intended to harm Laura. As she admitted, they were intending to help her. (RR 4, p. 74) And, Laura's own witnesses negated foreseeability. Dr. Pentzien testified that, even if there had been a psychologist at the Church during the events, he could not have foreseen that these types of events would cause PTSD, because there was no violence nor bodily injury. (RR 13, p. 272-273)

The trial court refused to give any instruction to the jury about the First Amendment and its protections for the Free Exercise of Religion. And, the trial court refused to require that the plaintiffs prove malice or foreseeability. Thus, the jury was allowed to return a verdict for Petitioner, even though there was no evidence that anyone wanted to harm Laura, and even though it was not foreseeable that any of their conduct could cause PTSD.

After the Petitioner's favorable jury verdict, Tom Schubert then made a statement to the press, "This is a situation where religion went real bad." (Fort Worth Star-Telegram, March 23, 2002) Thus, from beginning

to end, this litigation has been a complaint about religion.

III. REASONS FOR DENYING THE PETITION

A. The Crux Of This Case Is The Nature Of Texas Personal Injury Law

The Texas Supreme Court held that the Petitioner's complaints would require a judicial inquiry that was beyond the *jurisdiction* of the Texas courts. Texas courts and Texas law had to yield to the First Amendment of the United States Constitution and the unique Free Exercise Clause in the Texas State Constitution. The court concluded that pursuing this tort path would not be neutral law, as required by *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). The Texas Supreme Court cited the United States Constitution, but also cited the Free Exercise Clause of the Texas Constitution. (Petitioner's Appendix A, p. 2a)[22]

Historically, this Court has granted deference to state supreme courts to decide the nature of their own laws, and the jurisdiction of their own courts. The Texas Supreme Court handed down a decision about Texas law, concluding that Texas law is not religiously neutral and would represent an interference with religion. It would seem appropriate for this

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[22] Similarly, the Court cited cases decided under the Free Exercise Clauses in both constitutions, such as *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996).

Court to grant a certain amount of deference to the Texas court's conclusions about the nature of its own law. The interests of federalism would seem to indicate that a state's construction of its own laws should be respected by this Court.[23]

Petitioner now brings to this Court her own version of the relevant tort standard for recovery of mental anguish damages. Petitioner avoids any citation to Texas standards for recovering mental anguish damages. Instead, returning to the fiction that this is a claim for *bodily injury*, Petitioner cites authorities regarding liability standards for assault and false imprisonment. Petitioner then argues that such black-letter liability standards are *neutral* when it comes to religion.

But, the Texas Supreme Court did not classify this case as one of bodily injury. It concluded that her proof was similar to a claim for intentional infliction

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[23] This Court's deference to state courts to control the substance of their own laws and the scope of their own court's jurisdiction is reflected in several major precedents regarding federalism. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law."); *Murdock v. City of Memphis*, 87 U.S. 590 (1875). Respondents do not argue that these precedents are similar to the case at bar, which is unique. But, the concerns of federalism suggest that a certain amount of deference is due to the Texas Supreme Court in deciding the non-neutral nature of Texas law.

of emotional distress. And, *liability* is only one-third of a personal injury case. A tort plaintiff must also prove that she suffered compensable *damages,* and demonstrate *causation*, *i.e.* that it was defendant's misconduct that proximately caused her damages.

B. Texas Personal Injury Law About Mental Anguish Is Not Neutral

When it comes to claims for emotional injuries, the law is not neutral. A body of law is "neutral" under *Smith*[24] if it involves *objective* factors that can be measured under clearly established standards without touching religion. For example, the law regarding the wording of deeds and real property is very objective. Therefore, law about ownership of real property can be neutrally applied to a church under a *Smith* analysis without concerns for church practices or doctrines. *Jones v. Wolf*, 443 U.S. 595, 603 (1979). In contrast, state personal injury law often fails the *Smith* test for neutrality. *Ayon v. Gourley,* 47 F.Supp.2d 1246 (D.Colo. 1998) (tort law often involves subjective judgments on whether conduct is appropriate or "outrageous," and therefore is not neutral law under *Smith*).

We briefly summarize relevant Texas law on (1) liability, (2) damages, and (3) causation. None are neutral. First, Texas *liability standards* for this type

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[24] *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

of case are very subjective. The Texas Supreme Court, below, concluded that Petitioner's claims resembled claims for *intentional infliction of emotional distress*. This is a controversial tort, because it depends upon a standard of conduct being classified as "outrageous." *Vaughn v. Drennon,* 202 S.W.3d 308, 319 (Tex. App. – Tyler 2006) ("The test for determining what conduct is extreme and outrageous is essentially a subjective one."); *Fields v. Teamsters Local Union No. 988*, 23 S.W.3d 517, 534 (Tex. App. – Houston [1st Dist.] 2000), quoting Justice Hecht's separate opinion in *Twyman v. Twyman*, 855 S.W.2d 619, 629 (Tex. 1993):

> What is "outrageous" unavoidably depends upon the sensitivities of the person asked to decide and to some extent the community in which the conduct occurs. The term "outrageous" is neither value-free nor exacting. Because outrageousness is a subjective, almost personal, notion, its application is as much a matter of who decides as of what happened.

Similarly, even the law regarding *assault* is hardly neutral, when there is no significant bodily injury. All torts inherently depend upon the factual context of the behavior. A kiss is a simple act of kindness, or an assault, depending upon the surrounding circumstances. *United States v. Sever*, 39 M.J. 1 (C.M.A.1994). The tort of "assault" normally involves intentional infliction of bodily injury, such as a deliberate attack to harm a person. But, those facts were not present here. Here, the jury was allowed to find an "assault" was committed if the Church

"caused physical contact" with Laura when he or she [a Church member] knew or *should reasonably have believed* that [Laura] would regard the contact as *offensive.*" (Jury Instruction, 63a, emphasis added).[25] Thus, the fact finder could impose liability if it felt that Pastor McCutchen should have *reasonably believed* that simply touching Laura on the forehead was "offensive."

And, liability became even more subjective when the Church was left in a *loco parentis* situation. Laura's parents left town knowing that the Church would often be supervising Laura, a minor. Under *in loco parentis*, a defendant is allowed the right to exercise "reasonable" restraint over the child in their temporary custody, the same as a parent. *Hogenson v. Williams*, 542 S.W.2d 456 (Tex. Civ. App. – Texarkana 1976, no writ) (adopting the *in loco parentis* standards of Restatement of Torts (Second) §§ 147, 150, 151, and 155, but expanding the rights to include *reasonable* force to enforce compliance with a command issued for the purpose of controlling, training or educating the child.)

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[25] Jury Instruction 63a, instructed: "A person commits an assault if he (1) intentionally, knowingly, or recklessly causes bodily injury to another; (2) intentionally or knowingly threatens another with imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another [Laura] when he or she [Church member] knows or should reasonably believe that the other [Laura] will regard the contact as offensive or provocative."

Neutrality and objectivity disappear altogether when it comes to the legal tests for *compensable damages.* In general, mental anguish damages are generally not recoverable under Texas law. *City of Tyler v. Likes,* 962 S.W.2d 489, 496 (Tex. 1997). The exceptions are for unusual cases that involve significant bodily injury (not present here) or injuries of a "shocking and disturbing nature." Also, they can be recovered if the defendants acted with an evil *mens rea* that shows "increased culpability." Trying to decide if the Church and Respondents acted with an evil *mens rea* would mean weighing the motives and beliefs of the church members. Is prayer for deliverance from demons conduct that is "malicious" or "shocking and disturbing" under *City of Tyler v. Likes,* 962 S.W.2d 489, 496 (Tex. 1997)?

Finally, a tort plaintiff must establish proof of *causation:* that the reason she suffers her emotional injuries (PTSD) is because of the defendant's tortious conduct. Once again, this is hardly a neutral inquiry. Laura had been subjected to an entire life time of teachings about demons and "spiritual warfare." Her own expert witnesses, such as Dr. Swen Helge, said that the teachings of the Church about demons (which is protected activity) and the alleged restraint (the alleged tortious activity) have *together* traumatized Laura. Dr. Helge honestly admitted that he could not separate his opinions so as to ignore the general teachings of the Church.

When it comes to *causation* for emotional injuries, Texas courts openly confess that they are subjective. *City of Tyler v. Likes,* 962 S.W.2d 489, 496 (Tex. 1997) ("the law has not yet discovered a satisfactory empirical test for what is by definition a subjective injury.") And, the court has warned that the condition of Post Traumatic Stress Disorder (Laura's condition) is very *subjective* in terms of identifying a specific cause. *S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996). When it comes to causation, there is an "imperfect fit" between subjective psychology and objective law. Instead, "opinions about behavior, memory, and psychology depend largely on the *subjective* interpretation of the expert." *Id.* at 42, emphasis added. And, the Court warned that the use of a PTSD diagnosis in civil litigation involves "significant risks of misuse." *Id.* at 19.

In summary, abundant legal authority concludes that the Texas Supreme Court was correct about the non-neutral nature of Texas personal injury claims for recovery of mental anguish damages.

C. There Is No Larger Problem For This Court To Solve; Only Error Correction

Petitioner essentially concedes that the Texas Supreme Court's opinion is not part of any larger problem in American jurisprudence. There has never been a claim like this in United States courts. Petitioner's counsel states that they are "unaware of any other judicial decision" akin to the Texas Supreme

Court's holding below. (Petition, p. 24-25). In other words, Petitioner simply demands error correction.

The First Amendment does not generally insulate churches from civil litigation. Alan Stephens, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. Fed. 754, 774-77 (1989). On a weekly basis, churches and other religious institutions are sued for a wide variety of cases involving bodily injuries from auto accidents, misuse of funds,[26] negligence in treatment by church counselors,[27] slip-and-falls,[28] affairs by priests,[29] and child molestations.[30] Courts have consistently held that churches can not rely upon the First Amendment to insulate themselves from tort claims for bodily injuries.

However, this body of precedent shifts entirely when the claims are brought by *church members* who sue their former churches to complain of *emotional*

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[26] *Tilton v. Marshall*, 925 S.W.2d 672, 679 (Tex. 1996).

[27] *Nally v. Grace Community Church of the Valley*, 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215, *superseded on other grounds*, 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948 (1987, 2nd Dist.).

[28] *Garnier v. St. Andrew Presbyterian Church of St. Louis*, 446 S.W.2d 607, 608 (Mo. 1969), cited and explained in *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) ("The result is that the church, as the owner and occupier of the premises in question, is subject to all the duties and liabilities which are incident to the ownership and possession of real estate.").

[29] *Strock v. Pressnell*, 527 N.E.2d 1235 (1988).

[30] *Noll v. Hartford Roman Catholic Diocesan Corp.*, 2008 WL 4853361 (Conn.Super. 2008).

injuries. In those cases, the courts often refuse to grant relief, or even to entertain the suits. See Stephens, *Free Exercise*, *supra*, 93 A.L.R. Fed. 754.

The Petition cites *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 776 (Okla. 1989). There the court concluded that a church member, *after she left the church*, should have been free to continue her life without continued interference from her former church. But, the court in *Guinn* held just the opposite regarding her complaints against the church about conduct that had occurred *while she had been a member*. As to all church conduct that occurred while she had been a member, the court dismissed all the complaints of tortious conduct causing emotional injury. Thus, the true line regarding "voluntary participation" is membership. One can hardly insist that the Courts assist in a cafeteria-style approach to membership in a denomination, allowing each member to participate, or sue, as they pick and choose among the church's practices.

D. Petitioner Waived Her Complaints Ten Years Ago

This litigation has proceeded for more than a decade. Ten years ago, the Court of Appeals foreclosed her claims for emotional injuries, stating:

> Regarding negligent and intentional infliction of emotional distress, the First Amendment gives Pleasant Glade the right to engage in driving out demons – intangible or

> emotional harm cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for religious practices.

In re Pleasant Glade Assembly of God, 991 S.W.2d 85, 89 (Tex. App. – Fort Worth 1998, orig. proceeding), *Pleasant Glade I*.

Petitioner decided not to appeal that 1998 decision, nor seek further mandamus, certiorari, or otherwise protest this foreclosure of her claims for emotional injuries. Instead, Petitioner attempted to disguise her remaining claims as if they were claims for bodily injury. However, she did not prove such a case at trial. Having failed to prove that there was any significant bodily injury, she returned to her complaints that the "Hyper-spiritual atmosphere" at the Church had caused her emotional harm. But, such a tactic ran afoul of the law-of-the-case from *Pleasant Glade I*. The Texas Supreme Court, below, expressly noted their reliance on *Pleasant Glade I*.

E. The Ecclesiastical Autonomy Doctrine Was Correctly Applied

The Petition concludes with a citation to Justice Brandeis's famous admonition in *Olmstead v. United States*,[31] that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." The Petition argues that Laura had

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[31] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

the right to be "let alone" *by the Church*. What the Petition omits by carefully parsing this quotation is that Justice Brandeis is admonishing that civilized men have the right to be "let alone" *by the government*. *Id.* at 478.

It is fundamental that the Constitution embraces the right to be free from unwarranted *government* intervention. The Constitution is not a restraint upon private conduct. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 (1989). The Petition for Certiorari turns Justice Brandeis on his head when it suggests that Brandeis would favor governmental intervention, via the courts, into a private worship service.

The Amicus Brief submitted by the American Jewish Congress argues that governmental interference becomes proper at the time that Laura Schubert stopped "voluntarily participating" in the conduct of the Church. The AJC argues that "voluntary participation" is the constitutional key. Once it is withdrawn, then conduct becomes tortious and justifies governmental interference via the imposition of civil liability on churches.

This "voluntary participation" position might sound laudable on paper, but it is impossible to apply to an enthusiastic crowd of Pentecostals in the midst of spiritual warfare. App. 9-10. The Pentecostal belief about demonic forces is that human will is subverted,

and an unnatural hostility to the name of *Jesus* surfaces.[32] Thus, when Laura Schubert passed out and began writhing on the floor and hallucinating that demons were attacking her, asking her whether she would like to continue "voluntary participation" in Pentecostal practices would be fanciful. This would be akin to asking a person in a diabetic coma or an epileptic fit whether they would like to voluntarily participate in medical care or prayer. Laura's own expert witness, a medical doctor, said she was in a hypo-glycemic delirium.

It is significant that even the American Jewish Congress expressly rejects the standard of individual "voluntary participation" when it comes to young Jewish boys facing circumcision. The American Jewish Congress cites *In re Marriage of Boldt*, 176 P.3d 388 (2008) in its Amicus Brief. In that case, the

---

[32] Deliverance from demonic possession means "Jesus frees individuals whose wills are controlled by a hostile, alien, and destructive power." And, possession means that "a dominating control is gained over the personality." Stanley M. Burgess, ed. *Encyclopedia of Pentecostal and Charismatic Christianity*, p. 128 and 189 (Berkshire Publishing 2006). These beliefs and practices may seem quite strange to the reader. But, they are certainly no stranger than the beliefs and practices of the church in the case of *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). There, this Court decided that the Free Exercise clause protected the religious practice of slaughtering animals to feed their blood to demons during worship services. Pleasant Glade Assembly of God simply seeks the same rights to Free Exercise as was recognized in that case.

AJC denied that a young boy could lawfully refuse circumcision:

> In response, father, joined by amicus curiae American Jewish Congress . . . (collectively, AJC), argues that the trial court did not need to hold an evidentiary hearing, because M's [12 year old boy's] attitude about whether he wants the circumcision is not legally significant. Father asserts that a child is not the decision-maker on such questions, any more than an infant who is circumcised.

The court agreed with the AJC, that the child's objections were irrelevant, so the father could force circumcision on the child. *In re Marriage of Boldt*, 176 P.3d 388 (Ore. 2008). This is interesting, because some authorities on Post Traumatic Stress Disorder claim that male circumcision is an assault that traumatizes the child, causing PTSD. *Adverse Sexual and Psychological Effects of Male Infant Circumcision*, Psychological Reports, No. 88. p. 1105; and George C. Denniston, *Understanding Circumcision: A Multi-Disciplinary Approach to a Multi-Dimensional Problem,* pages 253-270 (2001).

"Voluntary participation" in a set of beliefs is generally shown by membership in the denomination. Otherwise, Laura's supposed withdrawal of her voluntary participation would be a constantly changing wind. One minute she was proclaiming that she wanted to be a missionary for the Church, the next she was "hallucinating" (her terms) about being attacked by demons, the next she was summoning the

youth of the Church so that she could share with them her recent vision, the next she was "finally complying" with the Church's request to say the name of *Jesus*. She then returned to the Church day after day. Her "voluntary participation" did not end, even when her father began writing letters about "friendly fire" from spiritual warfare. He said she would someday return to the "front lines" to continue the spiritual battle as a missionary for the Church. (App. 6)

Thus, the point at which she finally indicated that she wanted to be "let alone" by the Church, was long after all of the incidents, when she permanently left the Church.

The Texas Supreme Court's decision below is consistent with the body of law generally referred to as the Ecclesiastical Autonomy Doctrine. The Doctrine recognizes that it is not only the final imposition of liability, but the civil process *itself*, which impinges on a Church's Free Exercise rights:

> The resolution of such [civil law] charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

N.L.R.B. v. Catholic Bishop of Chicago 440 U.S. 490 (1979).

The very act of writing this Brief requires the Church, to some extent, to explain and partly justify its beliefs to outsiders. The very process of the judicial inquiry causes an *entanglement* between church and state (the courts). Respondents respectfully submit that even granting certiorari will entangle this Court in this religious dispute. The Texas Supreme Court declined to insert itself between the Church and its own members. This Court should respect that decision, and not force the Texas courts into this religious fray.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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December 15, 2008

August 2, 1996

Dear Pastor,

Thank you for the two occasions that we have had to talk since the week of Wednesday, June 5th to Wednesday, June 12th. Laura is still really struggling, as is our family. . . . This Wednesday night Laura talked to me and told me things that I had never heard about the Friday night, Saturday morning experience. She almost relived it in my presence and I hope, though difficult, this was a breakthrough for her. I had not heard many of these things before and I felt that you needed to hear what Laura told me.

* * *

This is what Laura told us happened. One boy (Ray) was in the sanctuary praying because he was burdened for the group again. The lights in the sanctuary were off. Rod checking on him and the boy told Rod that while praying he had seen a demon by the sound booth. He said that he had gotten scared and prayed and the demon left the church and the burden lifted. Rod called the other kids into the sanctuary. Laura says that Rod has told stories at some other times about demons to the kids relating to another church where a pastor had to sleep outside because of the demons in the church. When the young people entered the sanctuary, they turned on only the platform lights so the atmosphere at midnight was probably pretty spooky in the sanctuary. Laura says the boy shared with them about seeing the demon

leaving the church and it was strange and errie, [sic] but they accepted it. Then they started praying for each other and slaying each other in the Spirit. Things got emotional right away. Then the boy who said he saw a demon earlier saw more demons. He said with excitement and fright, "They are still here! They're still trying to get us! They're running, woo, there goes another one!" The kids were stunned. Rod got right into it and said to the stunned kids, "He's right, we've got to get them!" Laura said Rod got very excited, yet he was very serious and convincing. He said things like, "This battle is not over yet!" He told everyone to get the bottles of oil and anoint everything. "Don't leave anything untouched." The boy was still saying, "There's another one, there's another one!"

The kids started to anoint the church and Rod started to sense more demons in the church. He called the kids to near the sound booth and asked the kids, "Can you feel it? Can you feel the coldness of the demon?" The kids felt chills and goose bumps of fear. Laura says she was scared. Rod starting coming against the demon loudly. All the kids were screaming at the Devil and telling him to leave. They were beating the sound booth door. Rod said, "They're running, they're running! They're all over this church! We've got to get them!" The kids were in panic and fear. Rod was so serious. Holly was into it also. At one point the phone rang. Holly said that there was a demon on the phone line and that she heard it breathing. This was frightening to the kids.

As Laura tells it, things were going crazy, but that night she thought it was God, or rather demons; a real spiritual experience.

* * *

. . . This frightening experience went on until about 4:30 am in the morning when the kids were exhausted, and physically and emotionally drained. The kids sat down exhausted on the floor. At about that time Rod said that saw a cloud of the presence of God fill the church.

* * *

The next day, Sunday, June 9th, Laura, Amy and Joseph went to church. During this service several of the young people gave testimonies of what had happened on Friday night. They believed that it was all God's moving. The people of the church, who did not know the details of what had actually happened, thought it was God also. There were "amens" and applause for the kids bravery under fire. . . . Supposedly Joseph was down on the floor for over two hours with kids and adults all around him praying. Amy says that it got weird. The kids were making strange moans and praying loudly and wildly. Amy had to call her boyfriend to cancel their lunch and told us that she hung up very quickly so that he would not hear the noises being made by the youth group. Amy was stunned by the service. Many people stayed for a long time, but by 2:30 pm most of the people had left to go home. Joseph was still on the floor with the group praying for him. Even though Rod told you that Holly

was misunderstood, Laura says that Holly was over Joseph and saying that she saw demons coming out of Joseph. Holly said to Laura that she saw a vision of the claw of a demon coming out of Joseph's neck and on his back. She told Laura that she saw in a vision Laura and Kevin on a mountain with large knives, cutting a path for the demon to leave Joseph. She said she saw another demon holding Joseph's leg. When his knee happened to jerk (after being on the floor for two hours), Holly said "God just gave me a vision of the last demon coming out of Joseph." Laura says others heard Holly also.

* * *

. . . Laura was standing at the altar and told a girl that she wasn't feeling well and the girl prayed for Laura but Laura collapsed to the ground. People saw Laura laying on the floor grinding her teeth and looking very strange. She was having a physical and emotional breakdown, but nobody had enough understanding to realize it. Everybody at church was concentrating on thinking revival was taking place when in realty Laura was being seriously hurt. We do not know how long people prayed and rebuked the Devil over her. Several of the youth were allowed to hold her down until she was physically bruised. Laura had bruises and scratches on her from the kids being permitted to use force to hold her down. We saw the bruises when we arrived home. She apparently was fighting wildly at the altar.

* * *

. . . Understand that Laura was not sleeping through the nights because she was so frightened by all the demon business. After the service Rod told the young people to find a place to pray. The youth service sermon that night was on putting on the armor of God and fighting off the darts of the Devil. It seems it was always fighting the Devil, just like the play the kids did where Holly painted them horribly with the number 666 on their foreheads and wrists and used a blacklight to make a frightening situation. At some point, one of the young people saw that Laura was over in the corner balled up and looking strange again. He said, "Its happening again. Laura, we wouldn't let you fight this along [sic]." He called Rod and Holly and all the young people over. Everyone began to realize that she is in trouble, and they all started to pray strongly and loudly, coming against the Devil.

* * *

Since these many experiences Laura has started having terrible nightmares. Laura has had the feeling that a demon is in her room at night. She has had nights where she is so scared that she can't move, even to turn on the light or the TV, or to come to get us.

* * *

. . . As missionaries we can not [sic] get into local church affairs. We will leave it to you to investigate if you feel it is necessary. You may not feel that anything

too serious has happened . . . I am placing this situation in your hands and hope God gives you wisdom.

* * *

. . . Years ago Laura faced fear and danger in Africa and was emotionally hurt by violence seen in a government struggle. There we had real things to be frightened of and were warned by the US government to watch out for real dangers. I was afraid. . . . What those kids went through during a night of spiritual battle was just as hurtful as what Laura faced in Africa. Laura knows that Demons are bigger and more dangerous than Cameroonian soldiers with machine guns. Pray for her. She went through a war and is now a casualty, feeling abandoned by her own troops at the frontlines as an injured soldier. She deserves a purple heart because she fought a good fight, though she took a hit from friendly fire. . . . We are believing that in the [sic] with time she will be able to be trained to go back to the frontlines of the battle and to fulfill the ministry call that she received at the altars of Pleasant Glade.

Sincerely,

Tom Schubert

AFFIDAVIT OF TOM D. SCHUBERT

1. My name is TOM D. SCHUBERT. I am 46 years of age. I reside at xxxxx xxxxx xxxxx, xxxxx, xxxxx xxxxx. . . .

2. I am an ordained minister with Assemblies of God. I hold a Bachelor of Science degree in Christian Education from Southwestern Assemblies of God College, Waxahachie, Texas, and I have been an appointed missionary of the Assemblies of God since 1985. I am a Plaintiff in this lawsuit. Laura Schubert is my daughter. Judy Schubert is my wife.

* * *

6. As a minister in the Assemblies of God organization, and as one who is familiar with the Church's position papers, I have read the position paper of the General Council of the Assemblies of God entitled, "Can a Believer Be Demon Possessed." It is the official position of the Assemblies of God on this issue. It is attached as pp. 15-23 of Exhibit C of Defendant McCutchen's affidavit in support of Defendants' Motion To Dismiss. This document is also available on the internet, free of cost. This paper clearly teaches that the Assemblies of God organization does not believe that Christians (believers) can be possessed by demons and that the organization does not practice "exorcising" or "delivering" demons from Christians. . . .

7. As an expert in the theology of the Assemblies of God faith, I have reviewed Defendant McCutchen's letter of March 18, 1996 . . . In both documents

Reverend McCutchen states that while praying for my daughter on Wednesday night, June 12, 1996, he spoke the words "Come out, in the name of Jesus!" or words to that effect. These are the words of an "exorcism" practice and such practice is contrary to the published Assemblies of God beliefs and practices and outside the religious tenets of the church.

8. On or about May 19, 1996, Laura Schubert was baptized in the Pleasant Glade Assembly of God Church by Reverend Lloyd A. McCutchen. As a certified baptized believer, Laura Schubert could not be demon possessed, according to Assemblies of God beliefs and doctrine and could not have the need of having demons exorcised from her being because the Assemblies of God organization does not practice casting demons out (exorcising) of believers.

* * *

FURTHER AFFIANT SAITH NOT.

/s/
TOM D. SCHUBERT

* * *

AFFIDAVIT OF PASTOR LLOYD A. MCCUTCHEN

* * *

1. My name is Lloyd A. McCutchen. I am 54 years of age and I reside at xxxxx xxxxx xxxxx, xxxxx, xxxxx xxxxx. . . .

2. I am the Senior Pastor of Pleasant Glade Assembly of God. I have been a Pastor of Pleasant Glade Assembly of God since 1985 and a Pastor within the Assembly of God Denomination since 1968. . . .

* * *

7. Laura Schubert, Tom Schubert, and Judy Schubert are long time members of the Assembly of God Denomination. In fact, Tom Schubert and Judy Schubert served as missionaries to Cameroon, Africa on behalf of the Assemblies of God Denomination. After returning from that assignment, they began attending the Pleasant Glade Assembly of God Church. Obviously they were never coerced to attend and did so of their own free choice. Tom Schubert has occasionally preached from our pulpit.

* * *

16. Within our church, it is not unusual for a person to be "slain in the spirit". This is a biblical experience, related in several accounts of the Bible. When this happens, a person often faints into semi-consciousness, and sometimes lies down on the floor of our church. It is our belief that this is a positive

experience in which the holy spirit comes over a person and influences them. It is our belief that the holy spirit is not the only spirit that can influence a person. Evil spirits can move and can torment persons. Also, it is possible that a person (particularly a young dramatic person such as Laura Schubert) can take advantage of the attention that this activity brings. They can fake the entire experience in order to draw attention to themselves.

17. When a person comes forward in the service and begins having one of these experiences, it is sometimes difficult to discern whether: (1) the person is having a positive experience with the holy spirit, (2) whether there might be evil spirits engaged in warfare against the holy spirit, (3) whether there are emotional issues are involved, or (4) whether the person is faking the entire process in order to gain attention. Discerning between these various influences and factors is a matter on which even pastors within the church might disagree. Tom Schubert (who was not there) attributes Laura's collapsing on the floor to emotional and physical exhaustion. Myself and others within our church attribute Laura's actions to other factors.

* * *

Further Affiant sayeth not.

LLOYD A. McCUTCHEN,
PASTOR

SUBSCRIBED AND SWORN TO BEFORE ME on this ___ day of July, 1995.

* * *

WHERE WE STAND

* * *

The Official Position Papers
of the Assemblies of God

* * *

Introduction

The statements on the issues in this book were approved as the official statements of The General Council of the Assemblies of God by the General Presbytery, the ruling body of the Assemblies of God, over the past twenty years. . . .

* * *

1
The Inerrancy of Scripture

We believe the Bible is the Word of God written; it is the revelation of the truths of God conveyed by inspiration through His servants to us. As such, it is infallible and without error.

* * *

2
Can Born-Again Believers Be Demon Possessed?

The spread of oriental religions and the occult in America has brought with it an increase in demon possession similar to that reported formerly by missionaries on foreign fields. All too often there has been too little teaching in this area. Many have felt

all that is necessary is to preach Christ, and the demons will go away.

But the New Testament does more than command to preach Christ. It warns very definitely against the enemy of our souls and shows that demons are not to be treated lightly. It also emphasizes that deliverance is available through the "finger of God," the power of the Spirit, and the name of Jesus.

The Danger of Extreme

There is a danger, however, when emphasizing any neglected doctrine, to go to an extreme which is beyond the intent of the Scriptures. It is also possible to be sidetracked into making the neglected doctrine the whole ministry. This seems to be the case with some who become fascinated with the subject of demonology. They are trapped into giving most of their attention to it. The more demons they cast out, the more there seem to be to cast out, and the rest of their ministry is practically ignored.

* * *

One of the regrettable side effects of an unscriptural over-emphasis on demonology is that scriptural teaching is sometimes brought into disrepute. This was one result of the so-called witchcraft of 16th and 17th century England and 17th century America. . . .

* * *

Though many of the accused showed a spirit and a faith worthy of Christian martyrs, judges who were

men of personal integrity pronounced them guilty. As a result of the publicity given these trials, Americans of that day turned away from the supernatural and branded all that the Bible teaches about Satan and evil spirits as mere superstition.

* * *

Exercising caution, however, does not mean we should treat the matter of demonology lightly. The Bible clearly recognizes both the activity of demons and their great number. This is even more evident when we recognize that the word *devils* in our common English version really means "demons." Actually, the word *devil* (Greek, *diabolos*, "the slanderer") is appropriate only for Satan. This is not to say, however, that the devil does not work through demons. Satan is a created being, a finite spirit, and is not omnipresent. He does most of his work through demons scattered in various parts of the world. Jesus' work in casting out demons was at least a part of His work of healing those oppressed (exploited, dominated, under the tyrannical rule) of the devil (Acts 10:38). (It should be noted that the word *oppressed* as used here is stronger than in today's usage.)

* * *

What Writers Have Said

Most of the older writers say that genuine Christians cannot be possessed or indwelt by a demon.

* * *

More recently writers of various denominations have taken a different view. M. H. Nelson, a medical doctor, tells of numerous reports of Christians who apparently have suffered from demon possession. He suggests, however, that some of them may be in open rebellion against God. (Apparently, he believes in eternal security and still calls these rebels Christians.) He goes on to say, however, that though a demon may gain an influence *over* the mind and body of a Christian, it is very doubtful that the body of a Christian can be *possessed* by a demon.

Others say that a Christian can have a demon in his body without it possessing his inner man. This seems contrary to the biblical view of the body as the temple of the Holy Spirit. It also goes against the biblical view of the unity of the body, soul, and spirit as far as responsibility is concerned. The fragmentation of the person into various aspects is a heathen idea. If a demon enters any area of the body or mind (or attitudes), it enters *you*!

* * *

Resisting Evil Forces

It seems evident that the term *possessed* should not be applied to true believers. What the Bible does show is that Satan and his cohorts are external foes. We are in a warfare against Satan's forces and they are looking for opportunities to *attack* us. (See Ephesians 6:12.) The biblical emphasis is on what we must face in the very atmosphere around us. The call is never for us to get someone to cast the demons out of

us. They are out there attacking us, testing us, not possessing us. . . .

* * *

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(3)

Supreme Court, U.S.
FILED
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No. 08-592

IN THE
SUPREME COURT OF THE UNITED STATES

LAURA SCHUBERT,
Petitioner,
v.
PLEASANT GLADE ASSEMBLY OF GOD, REVEREND LLOYD A. MCCUTCHEN, ROD LINZAY, HOLLY LINZAY, SANDRA SMITH, BECKY BICKEL, AND PAUL PATTERSON,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Texas

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

After a Texas jury unanimously concluded that Respondents had assaulted and falsely imprisoned Petitioner without her consent, a divided Texas Supreme Court overturned the jury's verdict and trial court's judgment, and dismissed Petitioner's claims in their entirety, based solely on the Majority's interpretation of the Free Exercise Clause of the First Amendment.[1]

The Petition in this case presents a single issue for review by this Court: Whether the Texas Supreme Court Majority correctly interpreted and applied the Free Exercise Clause when concluding that provision of the Federal Constitution precludes the imposition of civil liability for the religiously-motivated assault and false imprisonment of Petitioner.

In their Brief in Opposition, Respondents acknowledge the relevance of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), to a proper analysis of the Free Exercise

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[1] Because the Texas Supreme Court dismissed based only on its interpretation of the First Amendment, it did not reach any state law issues raised by the parties. Petitioner is not seeking review in this Court of those issues. *See* Petition at 3 n.5.

Clause issue presented by this case – decisions ignored by the Texas Supreme Court Majority.[2]

At the same time, Respondents do not even mention the four decisions of this Court which the Texas Supreme Court Majority did cite as support for the view that the Free Exercise Clause requires dismissal of Petitioner's claims. Instead, Respondents defend that conclusion by arguing the Texas Supreme Court correctly applied the "Ecclesiastical Autonomy Doctrine" – a doctrine unrecognized by this Court.

Because the Texas Supreme Court's ruling dramatically and dangerously departs from this Court's First Amendment jurisprudence, and conflicts with decisions of other state courts of last resort and federal courts of appeals (Petition at 19-

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[2] Respondents maintain they "simply seek[] the same rights to Free Exercise" recognized by this Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), in which this Court "protected the religious practice of slaughtering animals to feed their blood to demons during worship services." Brief in Opposition ("Br. Opp.") at 36 n.32. There are material differences between this case and *City of Hialeah* – including that this case involved the physical invasion of a non-consenting *human being*. But most significant for purposes of the Court's consideration of the Petition for Writ of Certiorari is the fact the Texas Supreme Court Majority disregarded *City of Hialeah*, just as it did this Court's other relevant precedents, never even citing the decision, let alone discussing its relevance to a proper Free Exercise Clause analysis in this case.

40), the Petition should be granted.[3] *See* SUP. CT. R. 10(b), (c).

I. RESPONDENTS ERRONEOUSLY CLAIM THE TEXAS SUPREME COURT'S DECISION WAS NOT BASED SOLELY ON ITS INTERPRETATION OF THE FIRST AMENDMENT

Respondents contend the Texas Supreme Court's decision was based not only on the First Amendment, but also the Texas Constitution. *See* Brief in Opposition ("Br. Opp.") at 4 ("The Texas Supreme Court held below that such judicial inquiries were beyond the *jurisdiction* of the Texas courts. Texas courts were constrained by the First Amendment of the United States Constitution, **and** a unique Free Exercise provision in the Texas state constitution.") (italics in original; bold emphasis added); *id.* at 25 ("The Texas Supreme Court held that the Petitioner's complaints would require a judicial inquiry that was beyond the *jurisdiction* of the Texas courts. Texas courts and Texas law had to yield to the First Amendment of the United States Constitution **and** the unique Free Exercise Clause in the Texas State Constitution.") (italics in original; bold emphasis added); *id.* ("The Texas Supreme

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[3] *See* 48a-49a (Chief Justice Jefferson: "This overly broad holding not only conflicts with well-settled legal and constitutional principles, it will also prove to be dangerous in practice.").

Court handed down a decision about Texas law . . . .").

No plausible reading of the Texas Supreme Court's Opinion supports the claim that its decision was predicated on the Texas Constitution. The Majority referred only once, at the outset of the Opinion, to the provision in the Texas Constitution regarding freedom of religion, but otherwise never mentioned or discussed it. *See* 2a (noting TEX. CONST. art. I, § 6, with "see also" signal); *see also* Petition at 9 n.19. Respondents are unable to identify any other references to the Texas Constitution in the Majority's Opinion. *See* Br. Opp. at 25 (citing 2a). Moreover, Respondents contradict their own suggestion that the decision below was based on the Texas Constitution, observing that the application of the "unique Free Exercise Clause under the Texas Constitution" is among the "*unresolved* state law barriers" to Petitioner's claims. Br. Opp. at 1 (emphasis added).

In contrast with its single reference to the Texas Constitution, the Majority referred repeatedly to the Free Exercise Clause and the First Amendment, including when describing the nature of the appeal,[4] and when announcing the Court's holding.[5] That the

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[4] "This appeal concerns the tension between a church's right to protection under the Free Exercise Clause of the First Amendment and a church member's right to judicial redress under a claim for intentional tort." 2a.

[5] "The Free Exercise Clause prohibits courts from deciding

Majority relied exclusively on the First Amendment in dismissing Petitioner's claims is confirmed by the dissenting opinions, which address the First Amendment, but make no mention of the Texas Constitution.

Because the Texas Supreme Court's decision was based entirely on its view of the First Amendment, Respondents' request for "a certain amount of deference to the Texas court's conclusions" is unwarranted, and their invocation of the "interests of federalism" is inapposite.[6] *See* Br. Opp. at 25-26.

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issues of religious doctrine . . . . Accordingly, we reverse the court of appeals' judgment and dismiss the case." 26a-27a.

[6] Respondents recommend against granting *certiorari* because "[t]his Court usually reserves its jurisdiction to decide clearly presented Constitutional questions that will control the final outcome of a case." Br. Opp. at 2. Of course, the only question presented for review concerns the Free Exercise Clause of the First Amendment, and the outcome of this case *was* controlled by the Texas Supreme Court Majority's erroneous interpretation of that provision of the Federal Constitution. In furtherance of their argument, Respondents cite *Richardson v. Ramirez*, 418 U.S. 24 (1974), but do not disclose the passage they quote appears in a dissenting opinion, not the opinion of the Court. Br. Opp. at 2.

II. RESPONDENTS ERRONEOUSLY SUGGEST THE TEXAS SUPREME COURT MAJORITY CONSIDERED AND APPLIED THIS COURT'S DECISION IN *EMPLOYMENT DIVISION V. SMITH*

Respondents do not dispute this case is governed by *Smith*, 494 U.S. 872 – in fact, they seem to concede it on several occasions.

Recognizing the importance of this Court's decision in *Smith* to the argument that the Free Exercise Clause required dismissal of Petitioner's claims, Respondents imply the Texas Supreme Court considered and applied *Smith*. Specifically, referring to Petitioner's assault and false imprisonment claims tried to a jury, Respondents assert the Texas Supreme Court "concluded that pursuing this tort path would not be neutral law, as required by *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)." Br. Opp. at 25; *see also id.* at 31 ("[T]he Texas Supreme Court was correct about the non-neutral nature of Texas personal injury claims for recovery of mental anguish damages."). Respondents, however, offer no citation for this claim – presumably because the Texas Supreme Court never said anything of the kind.

As noted in the Petition, the only time a reference to *Smith* even appears in the Majority's Opinion is in a citation to Justice Green's dissent, in which he specifically discussed inconsistency between the Majority's decision and *Smith*. *See* Petition at 24.

Apparently mindful of the Majority's inattention to *Smith* in the decision below, Respondents spend several pages of their Brief in Opposition arguing that Texas law governing Petitioner's claims is not "neutral." *See* Br. Opp. at 27-31. While Petitioner views these arguments as unpersuasive, what matters for present purposes is that they were not made to, or considered by, the Texas Supreme Court, which effectively ignored *Smith* and this Court's other decisions addressing claims to First Amendment-based exemptions from neutral and generally applicable laws.[7]

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[7] Respondents appear to suggest this Court should deny *certiorari* out of deference to state court judgments about whether state laws comport with the "neutrality" requirement of the Free Exercise Clause. *See* Br. Opp. at 25-26 & n.23. As noted above, the Texas Supreme Court Majority failed to address this issue altogether. Yet even if it had considered the issue, this Court is the ultimate arbiter of the meaning and proper application of the Federal Constitution, and accordingly reviews state and local laws for their conformity with the requirements of the Free Exercise Clause. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (reviewing city ordinance's conformity with Free Exercise Clause requirements); *Smith*, 494 U.S. 872 (reviewing state law's conformity with Free Exercise Clause requirements).

III. RESPONDENTS DO NOT DISPUTE THAT THE TEXAS SUPREME COURT MAJORITY'S INTERPRETATION OF THE FIRST AMENDMENT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND INSTEAD RELY ON AN "ECCLESIASTICAL AUTONOMY DOCTRINE" UNRECOGNIZED BY THIS COURT

The Petition explained that in addition to ignoring *Smith*, the Texas Supreme Court Majority's Opinion scarcely addressed this Court's other First Amendment precedents, citing only four decisions of this Court in support of dismissal of Ms. Schubert's claims – none of which supports the Majority's view of the First Amendment. *See* Petition at 25-33; *see also* SUP. CT. R. 10(c).

Respondents do not defend the Texas Supreme Court Majority's reading of any of these four decisions of this Court. In fact, Respondents fail to mention a single one of them in their Brief in Opposition.[8]

Instead, Respondents invoke a so-called "Ecclesiastical Autonomy Doctrine," declaring it was "correctly applied" by the Texas Supreme Court. *See*

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[8] The four decisions are: *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *United States v. Ballard*, 322 U.S. 78 (1944); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976); and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). *See* Petition at 25-33.

Br. Opp. at 34; *see also id.* at 38 ("The Texas Supreme Court's decision below is consistent with the body of law generally referred to as the Ecclesiastical Autonomy Doctrine.").

Respondents cite a single case, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) – not discussed by the Texas Supreme Court Majority – in support of their claim that "[t]he Doctrine recognizes that it is not only the final imposition of liability, but the civil process *itself*, which impinges on a Church's Free Exercise rights." Br. Opp. at 38 (emphasis in original). Thus, they assert that "granting certiorari would, itself, be a rejection of the Ecclesiastical Autonomy Doctrine," and "entangle" this Court in a "religious dispute." Br. Opp. at 5, 39.[9]

But if Respondents are correct that the Texas Supreme Court applied and rendered its decision based upon the "Ecclesiastical Autonomy Doctrine," that is further reason to grant the Petition.

Petitioner is unaware of any case decided by this Court (including *Catholic Bishop of Chicago*, cited by

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[9] Respondents' extreme view of the First Amendment, which they convinced the Texas Supreme Court Majority to adopt, leads Respondents to conclude that "[t]he very process of the judicial inquiry causes an *entanglement* between church and state," and complain that "[t]he very act of writing this Brief [in Opposition to the Petition for Writ of Certiorari] requires the Church, to some extent, to explain and partly justify its belief to outsiders." Br. Opp. at 39 (emphasis in original).

Respondents),[10] using that phrase, let alone endorsing it as a doctrine for proper construction of the First Amendment. If such a doctrine is to be used by federal and state courts in interpreting and applying the Free Exercise Clause of the First Amendment, it should be done with guidance and approval from this Court in its role as the ultimate arbiter of the meaning of the Federal Constitution. *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 (1989) (Kennedy, J.) ("[T]his Court is responsible for assuring 'that state courts will not be the final arbiters of important issues under the federal constitution.'") (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)).[11]

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[10] Far from establishing an "Ecclesiastical Autonomy Doctrine," in *Catholic Bishop of Chicago* this Court concluded only that the National Labor Relations Act did not authorize the NLRB to exercise jurisdiction over teachers in church-operated schools. 440 U.S. at 507.

[11] As explained in the Petition, the Texas Supreme Court Majority's determination that the Free Exercise Clause requires immunity for a tortfeasor even when a victim resists or refuses consent to participate in a religiously-motivated act by the tortfeasor conflicts with the view of the Oklahoma Supreme Court. *See* Petition at 39-40 (discussing *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 776 (Okla. 1989)). Respondents do not dispute the sufficiency of the evidence supporting the jury's finding of lack of consent. *See* Br. Opp. at 3 ("At times, she was physically restrained during the prayers."); *id.* at 14 ("At times church members grabbed her arms and hands and restrained her *against her will*.") (emphasis added); *id.* at 16 ("According to several witnesses, Laura *yelled* something like 'no' or 'get away.'") (emphasis in

IV. RESPONDENTS' DISCUSSIONS OF TEXAS STATE LAW ISSUES ARE IRRELEVANT, AND NOT PRESENTED FOR REVIEW TO THIS COURT

Petitioner asks only that this Court review the Texas Supreme Court's interpretation and application of the First Amendment.[12]

In an effort to dissuade this Court from granting the Petition, Respondents repeatedly suggest review in this case would require deciding questions of Texas law unrelated to the First Amendment issues

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original). Instead, they attempt to explain it away, contending "voluntary participation" is a concept "impossible to apply to an enthusiastic crowd of Pentecostals in the midst of spiritual warfare." *See* Br. Opp. at 35; *see also id.* at 17 (observing, the fact that "numerous youths [held] down her arms and legs" in a "spread eagle" position is unsurprising because "Pentecostals believe that persons afflicted with demons are possessed with remarkable strength"). The Texas Supreme Court Majority erroneously embraced Respondents' view that mere "membership" in a religious organization strips a person of the right to be free from non-consensual assaults and false imprisonment. *See* 24a-26a; *see also* Br. Opp. at 33 ("[T]he true line regarding 'voluntary participation' is membership.").

[12] Respondents concede this Court has jurisdiction to address the Texas Supreme Court's interpretation of the First Amendment, but assert it "lacks jurisdiction to describe the parameters of the right which Petitioner ultimately seeks to vindicate . . . ." Br. Opp. at 1. The Petition makes clear Petitioner is not seeking review of those issues not yet decided by the Texas Supreme Court. *See* Petition at 3 n.5.

presented.[13] These suggestions are misguided. Reviewing the Texas Supreme Court's Opinion would not require this Court to decide questions of state law, any more than in the many cases it has previously decided, in which it reviewed state court decisions involving the application of the Free Exercise Clause to state and local laws. *See* Petition at 19-20.[14]

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[13] For instance, Respondents assert that "[t]o grant *certiorari*, this Court would have to conclude that it is in a superior position to map the contours of Texas personal injury law . . . ." *See* Br. Opp. at 4-5.

[14] Respondents do not dispute any of the facts set forth in the Petition, which contains all of the information relevant to the Question Presented for review. Nevertheless, much of their Brief in Opposition is dedicated to a discussion of "facts" neither presented to the jury, nor discussed in the Texas Supreme Court decision at issue. While these additional facts are irrelevant, it should be noted that Respondents have taken considerable liberties with the recitation of "facts" in their Brief in Opposition. For instance, Respondents represent to this Court that Petitioner's parents "left with the expectation that the church members would exercise parental supervision (*in loco parentis*) over their children." *See* Br. Opp. at 10; *see also id.* at 29 ("[T]he church was left in a *loco parentis* situation. Laura's parents left town knowing that the Church would often be supervising Laura, a minor."). Respondents fail to mention the Texas Court of Appeals determined "the record shows that Laura was primarily responsible for her own care and was not in the custody of anyone in particular while the Schuberts were out of town," and concluded that Respondents "did not stand *in loco parentis* as to Laura." *Pleasant Glade Assembly of God v. Schubert*, 174 S.W.3d 388, 395-96 (Tex. App. 2005).

Respondents also contend Petitioner "waived her complaints ten years ago" by not appealing a 1998 decision of the Texas Court of Appeals. Br. Opp. at 33-34. This claim lacks merit for several reasons – among them is that the decision which supposedly effected a waiver specifically *permitted* Petitioner to proceed with the very causes of action that were tried to the jury. *See In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 88 (Tex. App. 1998) (noting "Pleasant Glade does not argue that the false imprisonment, assault, and battery claims should be protected from objectionable discovery or dismissed based on the [First Amendment] defense."). In fact, Respondents informed the Texas Supreme Court that the Texas Court of Appeals decision in question "exempted from dismissal" Petitioner's "claims for assault and false imprisonment." *See* Reply Appendix at 1ra-4ra. In any event, this argument was not advanced before the Texas Supreme Court, and is improperly raised here for the first time.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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December 23, 2008

REPLY APPENDIX

REPLY APPENDIX

NO. _____

IN THE
SUPREME COURT OF TEXAS
Austin, Texas

PLEASANT GLADE ASSEMBLY OF GOD,
Petitioner/Defendant,

VS.

LAURA SCHUBERT,
Respondent/Plaintiff.

On Petition For Review From The
Second Court of Appeals At Fort Worth, Texas
Case No. 02-02-00264-CV

PETITION FOR REVIEW

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* * * *

STATEMENT OF THE CASE

* * * *

First Proceedings By The Court of Appeals: The Second Court of Appeals, via mandamus, directed dismissal of the complaints that the religious activities allegedly traumatized Laura Schubert. Such religious activities were constitutionally protected. See *In Re: Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex.App.–Fort Worth 1998, *orig. proceeding*). The Court of Appeals exempted from that dismissal the Plaintiffs' claims for assault and false imprisonment. Plaintiff then modified her allegations so that now the activity that allegedly traumatized Laura Schubert was the physical restraint.

* * * *

NO. 05-0916

IN THE
SUPREME COURT OF TEXAS
Austin, Texas

PLEASANT GLADE ASSEMBLY OF GOD,
Petitioner/Defendant,

VS.

LAURA SCHUBERT,
Respondent/Plaintiff.

On Petition For Review From The
Second Court of Appeals At Fort Worth, Texas
Case No. 02-02-00264-CV

BRIEF ON THE MERITS OF PETITIONER PLEASANT GLADE ASSEMBLY OF GOD

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First Proceedings By The Court of Appeals: The Second Court of Appeals, via mandamus, directed dismissal of the complaints that religious activities allegedly traumatized Laura Schubert. Such religious activities were constitutionally protected. See *In Re: Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex.App.–Fort Worth 1998, *orig. proceeding*). The Court of Appeals exempted from that dismissal the Plaintiff's claims for assault and false imprisonment. Plaintiff then modified her allegations so that now the activity that allegedly traumatized Laura Schubert was the physical restraint.

* * * *

Supreme Court, U.S.
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No. 08-592

IN THE

Supreme Court of the United States

LAURA SCHUBERT,

Petitioner,

v.

PLEASANT GLADE ASSEMBLY OF GOD,

Respondent.

On Petition For Certiorari To The Supreme Court of Texas

AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS*

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. To that end, it has taken a special interest in litigation arising under the Religion Clauses of the First Amendment.

A central unifying idea behind both clauses is that religious activity should be voluntary, neither impeded, subsidized, nor encouraged by government. Though that idea is simply put, it is often not simple to implement in practice, as this Court's cases demonstrate, particularly as government plays a larger role in society than it did at the time of the Founding. Nevertheless, this case should have presented a relatively straight-forward application of that principle—one which the court below obscured by recourse to other Religion Clause doctrines irrelevant here.

The brief is filed with the consent of the parties.

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[1] Pursuant to S.Ct.R. 37, we certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or counsel, made a monetary contribution to its preparation or submission.

ARGUMENT

I. THE JUDGMENT BELOW UNDERMINES VOLUNTARINESS AS THE UNDERPINING OF ALL RELIGION CLAUSE LAW

If this case involved the Boy or Girl Scouts restraining an adolescent participant against his or her expressed will pursuant to some secular ideology, no constitutional issue would be presented. Although the Texas Supreme Court thought otherwise, this case, involving religiously motivated restraints, would likewise present only a straightforward tort claim.

This Court should grant review of the troubling judgment below, so that tort actions against religious institutions do not encounter unfounded federal constitutional impediments.

The keystone of the American religion-state settlement in both practice and as it emerges from this Court's cases is that religious activity must be wholly voluntary. With all else that is in dispute about the Religion Clauses, the centrality of voluntariness is not.

Absent generally applicable, facially neutral legislation incidentally banning a form of religious worship or observance, or a compelling reason for a targeted ban, *Employment Division v. Smith*, 494 U.S. 872 (1990), Americans may participate, or refrain from participating, in whatever form of worship they voluntarily choose.

Petitioner explains why *Smith* applies to common law torts as well as to statutes. We add only that the point missed by the court below is more fundamental than the misapplication of one of this Court's cases.

Neither a public nor church official may enlist government's power to coerce an individual's participation in (or abstention from) otherwise legal religious activity. This is a principle which animates the pulsing vitality of American religious life. Religious leaders around the world have not been slow to make the connection between the principle of voluntariness and the vitality of American religion. See, *e.g.*, J. Ratzinger (now Pope Benedict XVI) and M. Pera, Without Roots (2006) at pp. 110-11.

Neither a public official nor a church leader has the legal authority to compel participation in a religious activity. If a religious leader or institution coerces religious practice with the assistance of government, the religious leader or institution as well as government are in violation of one or the other (or both) of the Religion Clauses. That is the teaching of the school prayer cases, *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist., Abington Twshp. v. Schempp*, 374 U.S. 203 (1963); as well as other cases, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (belief in God invalid requirement for service as notary public); *cf. Kerr v. Farrey*, 95 F.3d 472 (7th Cir. 1996) (mandatory Alcoholics Anonymous attendance).

For this very reason, some courts of appeal have refused to apply the deferential standard of *Estate of O'Lone v. Shabazz*, 482 U.S. 342 (1987) for passing on constitutional claims by prison inmates to challenges to compulsory religious practices, see, *e.g.*, *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005); *Murphy v. Mo. Dept. of Corrections*, 372 F.3d 979 (8th Cir. 2004).

The relative paucity of recent citations directly invalidating official religious coercion is not due to doubt about the principle; rather the clarity and universal acceptance of the principle makes it rare that public officials transgress it.

At the margins, it is not always certain what is voluntary and what is coerced conduct as the contesting opinions in *Lee v. Weisman*, 505 U.S. 577 (1992), illustrate. The bottom line remains undisputed—government may not coerce religious activity or aid others in doing so.

Where participation in religious activity is coerced by purely private authority, the law of torts, so much of which turns on consent, serves as the guarantor of voluntariness.

Consent need not be explicit. In the cases of participation in a religious activity, consent to must often be presumed by courts and other governmental bodies. Someone who chooses to participate in a religious activity voluntarily must be taken to have acquiesced otherwise tortious conduct inherent and

usual in that activity, even without a lawyer-drafted, formally signed and notarized consent. For a court to find otherwise—and retroactively at that—would again be to denigrate the voluntariness principle.

Allowing or repudiation of consent—on an 'if I knew then what I know now' theory—would work great harm to religious liberty, as no religious institution, officer or worshipper, could ever be sure that they could rely on an apparently voluntary consent. Similarly, where parents validly consent to a child's participation in religious activity, the child cannot validly later sue persons relying on that that consent. *Cf. In Re Marriage of Boldt*, 344 Or. 1, 176 P.3d 388 (2008) (rejecting claim that parent cannot consent to child's circumcision).

The simplest definition of 'assault'[2] is an unconsented touching. *LaBella v. Charlie Thomas, Inc.* 942 S.W.2d 127 (Tex. App. Amarillo, 1997). In a church where the laying on of hands is an integral, expected and ordinary part of worship, worshippers must be assumed to have consented to having others touch them in this way. They cannot later sue, alleging assault, unless and until they explicitly and openly withdraw the presumed consent, and convey that withdrawal to the relevant persons.

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[2] The opinion of the Texas Supreme Court variously refers to the relevant tort as assault, battery or assault and battery. There is no relevant difference between these formulations at this stage of the proceedings.

If consent is given but withdrawn, religious officials are not liable for actions taken under authority of the previously given consent. However, they have no immunity from tort liability as to activity taking place after a withdrawal of consent. Conduct which was permissible then becomes tortious. This is so even if the tort-feasors insist that they are religiously obligated to continue what they began with consent.

When Petitioner Schubert participated with her parents' knowledge and approval[3] in activities at Pleasant Glade Assembly of God Church, she must be presumed to have consented the "laying on of hands." until she communicated her withdrawal of consent. Thus, the very first "laying on of hands" on Schubert was not tortious.

However, when Schubert unmistakably communicated her withdrawal of consent to fellow worshippers and demanded to be released, conduct that was previously legally innocuous became tortious. At that point, the laying on of hands had to stop. After her withdrawal of consent, the leaders of the church could no more "lay hands" on a protesting Schubert, though a member of their church, than

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[3] This Petition presents no occasion to consider the problematic case where an adolescent and a parent disagree about the child's religious life. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 243-46 (1971) (Douglas, J. dissenting in part); *id.*, at 230-31 (majority opinion).

they could go out on the street, seize the nearest Jew or Catholic and "lay hands" on them to drive out demons possessing them.

That Schubert was of the same faith as the Respondent, that she initially participated voluntarily, that she initially shared the religious assumptions of church—indeed, that her father was a pastor in the same denomination—all justify presuming consent, but all are irrelevant after she explicitly and unambiguously manifested her objection to being restrained, as the jury found she did. Church members were not entitled to restrain Schubert to enforce on her their religious beliefs.

Respondents remained free to continue their own religious practices uninhibited by Schubert's withdrawal. They could pray out loud for the demons to leave her. They could warn her that she risked eternal damnation by asking them to release their physical hold. Tort liability for Schubert's subjective reaction to Respondent's pure expression of their beliefs would be a different matter entirely, and, though not now before this Court, would in fact raise substantial constitutional questions.

Beliefs, including expression of beliefs are entitled to absolute constitutional protection, *Employment Division v. Smith*, *supra*. Labeling one's objection to another's expression of belief a tort

cannot overcome the constitutional barrier to liability. But, this is simply not such a case.[4]

The jury in this case was apparently not instructed to distinguish between damages (if any) stemming from the original laying on of hands under presumed consent and those which accrued after the withdrawal of consent. As far as the record shows Respondent did not seek an instruction on this point.

Had Respondent requested that the jury be instructed to distinguish between actions taken under presumed consent and those taken after consent was explicitly withdrawn, and been refused, a jury verdict based on that faulty charge could not stand. This is not that case.

Unless, as the Texas Supreme Court held, any jury inquiry here would require a jury to determine religious truths, the reversal of the verdict on constitutional grounds was improper. No such inquiry was in fact indispensable to reaching a verdict for Petitioner.

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[4] This is also not a case where consent cannot be withdrawn without interfering with or interrupting other worshippers—say a rule that no one may leave a sanctuary when the minister is speaking or locking the door during certain parts of worship.

II. NO RELIGIOUS INQUIRY WAS NECESSARY HERE

To escape these first principles, the Texas Supreme Court invoked a line of cases prohibiting courts from deciding religions questions. Its reliance on those cases was misplaced.

American courts are not arbiters of religious truth. *Thomas v. Review Bd.*, 450 U.S. 707 (1981). As a matter of federal constitutional law, no official, high or petty, can decide what is orthodox in matters of, *inter alia*, religion, *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

A common application of this principle is that American courts cannot resolve so-called church property disputes by reference to "departure from doctrine" rule accepted in England. *Watson v. Jones*, 80 U.S. 679 (1871); *PCUS v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440 (1969).

Where ownership of church property is in dispute as a result of internal doctrinal division, those disputes may be decided by the courts only if they can do so by reference to deference to hierarchical authority or to neutral doctrines of law and, in each case, without deciding any religious questions. *Jones v. Wolf*, 443 U.S. 593 (1979).

The proscription against deciding religious questions applies even where the rule to be enforced is otherwise a generally applicable neutral rule.

Thus, for example, a fraud statute could not be applied where a determination of guilt requires passing on the truth of religious claims. *U.S. v. Ballard*, 322 U.S. 78 (1944) (prosecution under mail fraud statute for "falsely" claiming heavenly revelation barred by Constitution) *cf.*, *Commack Self Service Kosher v. Weiss*, 294 F.3d 415 (2nd Cir. 2002) (state may not enforce kosher fraud laws if those laws require it to decide ritual matters).

These principles would be relevant and controlling here had the jury been told that it could assess damages only if it found that laying on of hands was not a religious practice. *Thomas v. Review Bd.*, *supra*. The trial judge carefully avoided this pitfall. His charge, coupled with pre-trial rulings on evidence, steered the jury away from passing judgment on religious questions.

This ban on inquiries into religious truth does not stand for the proposition, as the Texas Supreme Court seems to have thought, that any case in which religion is in the background runs an impermissible risk of requiring a judgment on religious matters.

An examination of church books to assess sales taxes does not violate the ban on assessing religious doctrine. *Jimmy Swaggert Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990). Neither does enforcement of the Fair Labor Standards Act, even against a claim that the "workers" in question were religiously motivated

volunteers. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). And, most closely, neither does judicious invocation of the neutral principles of law rule to resolve church property disputes run impermissibly high risks of passing on religious issues.

All of this is far afield from this case. The jury was not invited to decide a religious question, nor set a negligence standard for behavior by clergy (*e.g.*, so-called clergy malpractice). Compare, *e.g.*, *Mermelstein v. Kehilat New Hempstead*, 11 N.Y.3d 26, 892 N.E.3d 375 (2008) with *F.G. v. MacDonnell*, 150 N.J. 550, 696 A.2d 697 (1997).

Schubert's jury had no need to pass on any religious proposition to determine whether she had withdrawn her consent to the "laying on of hands" and being restrained of her liberty. It was not invited to inject its own religious prejudices into its fact-finding. Its verdict against Respondent should have stood.

CONCLUSION

In the end, the judgment of the Texas Supreme Court upends fundamental principles of American church-state law. No doubt motivated by a commendable desire to protect the integrity of religious practice, its judgment paradoxically undermined the religious autonomy of individuals and that of religious institutions.

Worse yet, allowing that decision to stand unreviewed would cast doubt on the viability of tort lawsuits which in recent years have done so much to address the problem of sexual abuse in houses of worship. See Tim L. Lyton, Holding Bishops Accountable: How Lawsuits Helped Confront Clergy Sexual Abuse (2008).

For all these reasons, the prayed for writ of certiorari should issue to review the judgment below.

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